THE CATHOLIC UNIVERSITY OF AMERICA
STUDIES IN SACRED THEOLOGY
(Second Series)
No. 78

THE MORAL OBLIGATIONS OF CATHOLIC CIVIL JUDGES

A DISSERTATION

Submitted to the Faculty of the School of Sacred Theology of the Catholic University of America in Partial Fulfillment of the Requirements for the Degree of Doctor of Sacred Theology

by the

REVEREND JOHN DENIS DAVIS, M.A., S.T.L.

THE CATHOLIC UNIVERSITY OF AMERICA PRESS
WASHINGTON, D. C.
1953

This dissertation was conducted under the direction of the Very Reverend Francis J. Connell, C.SS.R., S.T.D., LL.D., as major professor, and was approved by the Reverend Alfred Rush, C.SS.R., S.T.D., and the Reverend Thomas O. Martin, S.T.D., J.C.D., Ph.D., LL.M., as Readers.

241.64 D26

THE CATHOLIC UNIVERSITY OF AMERICA
STUDIES IN SACRED THEOLOGY
(Second Series)
No. 78

THE MORAL OBLIGATIONS OF CATHOLIC CIVIL JUDGES

A DISSERTATION

Submitted to the Faculty of the School of Sacred Theology of the Catholic University of America in Partial Fulfillment of the Requirements for the Degree of Doctor of Sacred Theology

by the

REVEREND JOHN DENIS DAVIS, M.A., S.T.L.

70/C62

THE CATHOLIC UNIVERSITY OF AMERICA PRESS
WASHINGTON, D. C.
1953

NIHIL OBSTAT:

FRANCISCUS J. CONNELL, C.SS.R., S.T.D., LL.D.
Censor Deputatus

Washingtonii, die 10 aprilis, 1953.

IMPRIMATUR:

JOANNES A. FLOERSH, D.D.
Archiepiscopus Ludovicopolitanus

Ludovicopoli, die 13 aprilis, 1953.

NOTRE DAME
DEC 0 2 2005
LAW Library

COPYRIGHT 1954 BY
THE CATHOLIC UNIVERSITY OF AMERICA PRESS, INC.

Printed by The Abbey Press, St. Meinrad, Indiana, U.S.A.

TO MY FATHER AND MOTHER

"To you, dear sons, We wish with full heart that Divine Providence may grant you the exercise of your office always within the sphere of just legislation and in conformity with legitimate social requirements. Labor in every to make for yourselves the perfect ideal of a jurist who through his competence, his wisdom, his conscientiousness, his rectitude, merits and gains the esteem and confidence of all."

Pope Pius XII, "Address to the Union of Italian Catholic Jurists."

TABLE OF CONTENTS

CHAPTER	PAGE
FOREWORD	ix
I. INTRODUCTION—POPE PIUS XII ADDRESSES ITALIAN CATHOLIC JURISTS	1
A Papal Welcome to Rome	2
Nobility of the Jurist	3
Christian Concept of Law versus Juridical Positivism—The Christian Concept	4
Juridical Positivism	13
Moral Obligations of Catholic Civil Judges	18
Reaction to Address	19
A Dissertation	21
II. THE JUDGE THE PERSONIFICATION OF JUSTICE	23
A. Notion of Judge: Definition	23
B. Brief History of Judges	25
1. Ancient Judicial Systems	25
2. Judicial System in the United States	29
III. GENERAL OBLIGATIONS OF JUDGES	34
A. Dignity, Responsibility and Importance of the Judge	34
B. Necessary Qualities of the Catholic Judge	36
1. Knowledge	36
2. Integrity	39
a. The Judge and Gifts	41
b. The Judge and Bribes	45
3. Jurisdiction	50
a. Necessity of Jurisdiction	50
b. Incompetency of Civil Judges in Ecclesiastical Causes	52
c. Church and State	54
d. Canon 1553—Ecclesiastical Jurisdiction	56
e. *Privilegium Fori*	59
C. Obligations Relating to Judicial Procedure	64
1. Judge Obliged to Proceed according to the Just Laws of Country	64
2. Judge to Give Decision according to Public Knowledge	67
a. Duty of Judge Who Knows by Private Knowledge the Accused to be Guilty when He is Declared Innocent	68
b. Duty of Judge Who Knows by Private Knowledge the Accused to be Innocent when He is Declared Guilty	69
3. The Catholic Judge and Doubtful Cases	71
4. Obligations of Judge Who has Inflicted an Unjust Sentence	75

IV. THE CATHOLIC JUDGE AND UNJUST LAWS 77
A. Just Laws 78
B. Unjust Laws 82
1. American Jurisprudence and Unjust Laws 84
a. Sociological Jurisprudence 84
b. Economic Determinism 88
c. Realism 90
d. Analytical School 95
2. Legal Positivism 97
a. In Germany 100
b. In Italy 103
c. In Russia 104
C. The Just and Unjust Law—A Recurring Problem 108
D. Pope Pius XII's Four Norms to Guide Judges Relative to Unjust Laws 111
1. First Norm—Responsibility of Judge 112
2. Second Norm—Judge May not Command Action Intrinsically Evil 122
3. Third Norm—Judge Cannot Approve an Unjust Law 125
4. Fourth Norm—Not Every Application of an Unjust Law is Equivalent to Approval 127
E. Application of Norms to Unjust Laws in the United States 138
1. Sterilization Laws 139
2. The Judge and Possible Euthanasia Laws 148
3. The Judge and Contraceptive Laws 154
4. The Judge and Laws Opposed to a Human Good 164
V. THE CATHOLIC JUDGE AND DIVORCE CASES 167
A. The Church, Marriage and Divorce 167
B. The Church, State and Marriage 173
C. The State and Divorce Laws 175
D. Divorce Statistics 177
E. Evils of Divorce 178
F. The Catholic Judge and Divorce Cases 180
G. The Catholic Judge as an Official at Marriage 193
H. Contemporary Thought and Divorce 196
Conclusion 202
Bibliography 205
Legal Cases Cited 216
Abbreviations 216
Address of Pope Pius XII to the Union of Italian Catholic Jurists 217
Address of Pope Pius XII to the Sacred Roman Rota, Nov. 13, 1949 226
Index 233

FOREWORD

IN November of the year 1949, His Holiness, Pope Pius XII delivered two allocutions dealing with law and its application, namely, his addresses to the Union of Italian Catholic Jurists and to the Sacred Roman Rota. A jurist in his own right, Pius XII spoke of the Christian concept of law, of juridical positivism, and of the duties of judges especially regarding the application of unjust laws and the handling of divorce cases. Using these timely and important talks as a basis, the present dissertation treats of the same legal matters with some additions. It is humbly offered to the judges of our land as an aid to their better understanding of the Christian concept of of law and of the moral obligations of their high office.

The author wishes to express his sincere gratitude to His Excellency, The Most Rev. John A. Floersh, D.D., Archbishop of Louisville, for the opportunity of pursuing graduate studies in Sacred Theology at the Catholic University of America. He wishes also to extend special thanks to the Very Rev. Francis J. Connell, C.SS.R., S.T.D., LL.D., under whose wise and kindly direction the dissertation was written, and to the Rev. Alfred Rush, C.SS.R., S.T.D., and the Rev. Thomas O. Martin, S.T.D., J.C.D., Ph.D., LL.M., who graciously acted as readers of the manuscript and offered many helpful suggestions.

CHAPTER I

INTRODUCTION

Pope Pius XII Addresses Italian Catholic Jurists

The office of jurist, whether lawyer or judge, of its very nature, is of high importance and dignity. This is true because both the lawyer and the judge are employed in society in the noble threefold task of defending, restoring and perfecting fundamental human rights which God has rooted in man's nature. Both are concerned with the necessary administration of justice in the complicated affairs of human social living—the lawyer in pleading the just cause of his client, the judge in passing just decisions and judgments in the cases brought before his tribunal.

Early in the month of November, in the year 1949, the Catholic lawyers and judges of Italy assembled in Rome, and strongly desiring to come to a better practical understanding and solution of the many problems facing the law and its just and effective application in today's world, they there formed an association called the Union of Italian Catholic Jurists. After the members had completed the formation of their organization, they made their way on November 6 to Castelgandolfo, where they were received in audience by His Holiness, Pope Pius XII.

Pope Pius XII knows and appreciates the high importance and dignity of the legal and judicial profession. He himself is well versed in the law and its ways, having specialized in the study of civil and canon law as a post-graduate student, and having been both professor of canon law at the Apollinare and professor of international law and diplomacy at the Academy of Noble Ecclesiastics in Rome. He was the valued assistant and later co-worker with Cardinal Gasparri in the codification of canon law which appeared in 1917, and for thirty years, while attached to the Secretariate of State as a specialist in the legal field, he worked at the many prac-

tical problems of civil and international law. There is little wonder then that, when the Italian Catholic jurists paid their visit to the Holy Father at Castelgandolfo, Pope Pius XII spoke to them in person and at length as jurist to jurists. His address to them is quite important, for it serves to recall today legal concepts that are basic, fundamental, and Christian—concepts forgotten for some time now by many persons in the legal profession.

What did the Holy Father say to the Italian Catholic jurists? First (1), he welcomed them to the Eternal City. He spoke next (2) of the nobility of their profession, then (3) of the Christian concept of law as contrasted with the erroneous concept, juridical positivism, and finally (4), of the moral obligations of Catholic civil judges, with special regard to the application of unjust laws and the handling of divorce cases.

A Papal Welcome to Rome

In welcoming the Catholic jurists of Italy to the Eternal City the Holy Father told them that both as jurists and as Catholics they would find Rome a fitting place for their meeting, for this ancient city has a rich background both in law and in Catholicity. As jurists, they could very well remember that there came forth from Rome a body of law which became the law of all civilized Europe and which still is in force in great part in the institutions of modern times; as Catholics, they knew this city to be See of Peter, "the ever resplendent lighthouse of faith in Christ, the center of the visible unity of the Church, seat of the supreme magisterium of souls, where Catholicity appears with particular strength and greatness."[1]

He talked of the contribution Rome had made to a Christian jurisprudence, reminding them that when the empire of the Caesars was overthrown by peoples pressing across

[1] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," November 6, 1949, *Acta Apostolicae Sedis* (hereafter cited *AAS*), 41 (December 22, 1949), 598; English translation in *The Catholic Mind*, 48 (January 1950), 54.

its frontiers two things survived that decadence: the one was the *Corpus Juris Civilis*,[2] human in origin; the other was the new divine faith which Peter and Paul had brought there. These two vital realities, he declared, met and fused with an intimate bond. Gradually did the higher principles, requirements and dispositions of the new doctrine make their influence felt, with the result that the law of Rome was penetrated with a new light and was transformed in spirit, thus demonstrating to the modern world how "between true judicial science and the teaching of the Christian faith there is not opposition but concord."[3]

Nobility of the Jurist

Next, he spoke to them of the nobility of their profession. "You are," he said, "students of that noble one among the sciences which studies, regulates and applies the norms on which are based order, peace, justice and security in the civil community of individuals, societies and nations," dealing in things, as Ulpian declared, both human and divine.[4] For the jurist, the Holy Father said, the knowledge of human things alone is not sufficient. It will not do for him to occupy himself with only the earthly panorama of human events and social relations, though this is the more immediate object of his study. He must also have a knowledge of divine things, and for three reasons: first, because in human social living religion has a definite place, directing the practical conduct of the believer; second, because some of the institutions with which he deals in society are sacred in character, as for example, matrimony and the family; and third and principally because, without a knowledge of the Divine Being, he will lack knowledge of the foundation and basis of law itself. Also, as in the Christian economy the dignity of man has been infinitely increased in his elevation through grace by the Savior to a supernatural order and destiny, so too has

[2] The codification of Roman law, promulgated under Justinian's authority, A.D. 528-534.

[3] Pope Pius XII, *op. cit.*, p. 54.

[4] *Ibid.*, p. 53.

increased the nobility of the jurist who must make the Christian supernatural man and his regulatory laws the object of his study. The Holy Father said that in this necessary movement of the jurist between the human and the divine, between the finite and the infinite, lies the nobility of his science.

Christian Concept of Law versus Juridical Positivism— The Christian Concept

Following his words on the nobility of the profession of jurist the Holy Father spoke of the contrast between the Christian concept of law and that of juridical positivism. Just as in showing that the nobility of the juridical science rests in the jurist's necessary movement between the human and the divine, so also he here points out that the jurist's knowledge of the true concept of law is rooted in his knowledge of human and divine things. The jurist cannot have the correct idea of law, its function, its purpose, its basis, if his knowledge is only human, that is, if he knows man only in his human social relations. The true concept of law depends on a true concept of the nature of man. Not only must man be seen in those relationships binding him to self and to his fellowman, but he must be viewed in all his essential relationships, and principally in the relationship which binds him to God, as creature to Creator, as one ordered and directed to the one who orders and directs. The jurist must understand that man and all other creatures have been created by God, have received their ordering and direction from the highest transcendent Reality, and that this ordering and direction finds its determination in the nature of the individual creature. Without a knowledge of man's nature, including his relation to God, the most essential and basic of all his relations, the jurist simply cannot have the true concept of law. Such is the point which the Holy Father wishes to impress upon his hearers.

> If he the jurist is incapable of rising to the vision of the highest transcendent Reality . . . it will be

> impossible for him to perceive in all its marvelous unity and its intimate spiritual depth the interlacing of social relations and their regulative norms over which the law presides.[5]

This is an important point and the Holy Father emphasizes it a second time. He declares in a quotation from Cicero that the nature and essence of law is derived from man's nature, but is quick to point out that man's nature is not adequately understood unless his essential, ontological relation with God is considered. He puts it this way:

> As the great Roman legal counsellor and orator declared, "*natura juris . . . ab hominis repetenda* (*est*) *natura*," the nature or essence of law cannot be derived except from the very nature of man. On the other hand, this nature (of man) cannot be known even approximately in its perfection, dignity and high level and in its ends which direct and subordinate to themselves its actions, without the ontological connection by which it is bound to its transcendent cause. It is clear, then that the jurist cannot acquire a sound concept of law and cannot follow a systematic arrangement of it, unless he insists on seeing man and human things under the light which showers from the Divinity to illuminate the tiring course of his investigations.[6]

A third time he mentions the necessity of considering man's relation to God for a correct understanding of law when he speaks of the determination of the just and the unjust, or justice, as the most specific object of the juridical science.

Justice is that virtue, or good habit, whereby with a firm and constant will a person gives to another that which is his due. Catholic theologians usually speak of three types of justice—legal, distributive, and commutative. A fourth type, social justice, is sometimes added. Legal justice deals with the individual's obligations to society, as those of a part to the whole. It requires the individual as a member of society to render to society as a whole that which is its

[5] *Ibid.*, p. 55.
[6] *Ibid.*, p. 55.

due. Distributive justice, on the other hand, deals with the obligations of society to the individual, the obligations of the whole to a component part. It requires that the community and its leaders make an equitable and proportional distribution of the benefits and burdens of the community among its members according to their merits, capacities, and needs. Commutative justice deals with the obligations of one distinct individual to another distinct individual. It requires that each person in society give to every other person, including moral persons, that which is his due by strict right. When knowingly and wilfully violated, commutative justice, unlike the other types of justice, binds to restitution. Social justice, actually a form of legal justice, demands of the individual all that is necessary for the common good. It requires the individual to do what he is able, in company with others, to help the institutions of society to attain the common welfare.

The work of justice, it is seen, is to give to each what is his due. It has the function of regulating in society the balance of social and individual needs. It is not merely an abstract concept, a mutable external ideal demanding a changing historical conformity of the social order, but something permanent, something inherent in the very nature of man, of society and its institutions. Justice recognizes the universal norms of conduct established by the mind of God in the human and civil order upon which it dictates and imposes practical principles. According to St. Thomas, says the Holy Father, law is the object of justice.[7] Law is the norm in which the idea of justice expresses itself and becomes real and concrete. But as to what is the just and the unjust this is impossible to fathom unless one knows the nature, the basic order of the created thing and its relation to the Creator. In the words of the Holy Father:

> The science of the just and the unjust supposes, therefore, a more elevated wisdom which consists

[7] St. Thomas Aquinas, *Summa Theologica*, II-II, q. 57, a. 1; I-II, q. 95, a. 2.

> in knowing the basic arrangement of the thing created and consequently of its Arranger.[8]

Therefore, one cannot know what is just or unjust in regard to man unless he knows the rational nature of man, unless he knows of man's creation by God, his dependence on and responsibility to God, his ultimate end in returning to God. In this consideration of man's nature and his relation to God the idea of justice in law, of what is the just and the unjust law, receives enlightenment and clarification.

Further, it is to be remembered that the supernatural destiny of man is a most important consideration in forming the Christian concept of law—a consideration that cannot be omitted.

> If, then, you regard the subject of the law with the eyes of Christian faith, you will see it surrounded by a crown of light placed there through the Redemption of Christ, the blood shed for man's redemption, the supernatural life to which he has been restored and which he shares, and also the ultimate end assigned to man as the aim of his earthly sojourn.[9]

As the Holy Father points out in the above quotation, the idea of law cannot be a true Christian idea unless it conceives of man in his true dignity as raised to the supernatural order, having a supernatural end which is the participation of God's own happiness through the beatific vision. St. Thomas Aquinas tells us that all law must make men good, must lead to virtue.[10] And further, this must be not merely a virtue that will contribute to natural well-being but will enable man to attain his supernatural destiny of eternal salvation. All law should lead to God. As Christians we can never afford to limit our vision to earth alone, for we are not for earth alone. While many of those around us would content themselves with a natural explanation of all

[8] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (December 22, 1949), 601; *The Catholic Mind*, 48 (January 1950), 56.

[9] *Ibid.*, p. 56.

[10] *Summa Theologica*, I-II, q. 92, a. 1.

things and be satisfied with a natural end, we must ever bear in mind that in the present state of elevated nature the human race in its entirety has a supernatural destiny. That is as God has established it. Christian jurists, then, will understand that law orders man in human things, yes, but only insofar as they are related to the divine. For man's human nature comes into being by a creative act of Divinity and finds its end and purpose in living according as that Divinity has planned and willed here on earth, and finally in returning to him at the end of this earthly existence.

One week after his address to the Italian Catholic jurists, Pope Pius XII, on November 13, 1949, received in audience at Castelgandolfo the members of the Sacred Roman Rota.[11] Here again to a body of jurists, a body of men skilled in the law, he spoke of the Christian concept of law and rather lengthily of the false concepts of law based on positivism and state absolutism. From this address to the Rota, the following passage pertains to the Christian concept of law.

> It is impossible to observe with attention the corporal, spiritual, physical and moral world without being struck with admiration at the sight of the order and harmony which reign in all stages in the scale of being. In man that order and harmony are strictly realized according to the laws placed by the Creator in the existing being up to the boundary line where his unconscious activity ceases, and his conscious, free action begins. Beyond that line the ordaining Will of God is still in force. However, its realization and development are left to the free determination of man who can conform to or oppose the Divine Will.
>
> In this field of conscious human action, of good and evil, of precept, permission and prohibition, the ordaining Will of the Creator manifests Itself

[11] The Sacred Roman Rota is an ordinary tribunal constituted by the Holy See as a high ecclesiastical court of appeals, although it hears some cases of first instance. It is composed of a number of priest auditors, usually twelve, who must have attained the doctorate degree both in civil and canon law, and who are appointed by the Holy Father. Cf. *Codex Juris Canonici*, Canons 1598-1601.

> through the moral commandment of God written in nature and revelation, as well as through the precept or law of legitimate human authority in the family, the state and the Church. If human activity controls and directs itself according to these norms it remains of itself in harmony with the universal order willed by the Creator.[12]

The above quotation is remarkable for we find in it in summary fashion the complete idea of law and its general divisions. We have the picture of God in his eternal all-wise plan directing all created things in wonderful order and harmony to their proper ends. This is the eternal law, the "plan of divine wisdom as directing all actions and movements."[13] The eternal law of God expresses itself differently in different creatures but all creatures partake of it in the sense that they are ruled and measured by it.[14] Inanimate creatures, plants and animals inferior to man share in the eternal law in a necessary manner, i.e., all these creatures are determined to act as God directs them through their natures. They must act as nature directs; they cannot do otherwise. Examples of this are the heavenly bodies moving in exact order, the oak tree growing out of the acorn, the animal acting according to a marvelous instinct. These creatures act as God directs them by laws implanted in their very natures. They are not free to do differently.

Even in man there are some actions that are determined, such as growth, the beating of the heart, the circulation of the blood. But in contrast to other creatures man is subject to divine providence in a more excellent way. He has rationality. God has made us like to his own image. In addition to a body he has given us an immortal soul with intellect and will, a share of the eternal reason, whereby we become provident both for ourselves and for others. It is this ration-

[12] Pope Pius XII, "Address to the Sacred Roman Rota," November 13, 1949, *AAS*, 41 (December 22, 1949), 605-6; English translation from text issued by the National Catholic Welfare Conference News Service, Washington, D.C., November 14, 1949, p. 2.

[13] St. Thomas Aquinas, *op. cit.*, q. 93, a. 1.

[14] *Ibid.*, q. 91, a. 2; also q. 93, a. 5.

al creature's participation in the eternal law of God that we call the natural law.[15] It is as if God said to man: "I have determined all other creatures to act in a definite manner, but you I do not determine. You are like to my image. You have reason. It is for you to use this reason to understand your own nature, your dependence on me, your final end, and thus to determine yourself how I want you to act. I also give you a free will with which you are able to conform to or to oppose my Divine Will as I have expressed it in your very nature. Right living, however, comes in the conformity of the human will with the divine."

This is the natural law. It is what the Holy Father means when he says above: "... the ordaining Will of the Creator manifests Itself through the moral commandment of God written in nature."[16] Likewise it is what St. Paul meant when he said: "When the Gentiles who have no law do by nature what the law prescribes, these having no law are a law unto themselves. They show the work of the law written in their hearts."[17]

The natural law, however, is not the only means that God has appointed for directing man to his proper ends. In his wisdom he knew that some men would find it difficult because of the effects of original sin to use their reason correctly in determining right and wrong. He knows that man cannot possibly be conscious of his supernatural destiny unless it be revealed to him. God aids us, therefore, by expressing his Will also through the positive divine revelation of the Old and New Law, drawing back for us, as it were, the veil from his Divinity, and making known to mankind some truths supernatural in themselves, truths which unaided reason could never know, as well as other truths supernatural in the manner in which they are given, naturally discoverable to human reason, but which God made known to us that

[15] St. Thomas Aquinas, *op. cit.*, q. 91, a. 2.
[16] Pope Pius XII, "Address to the Sacred Roman Rota," Nov. 13, 1949, *AAS*, 41 (Dec. 22, 1949), 606.
[17] *Rom.* 2, 14.

our knowledge of them might be certain and less difficult to attain. These revealed truths in reference to action we call the divine positive law, given to us, as St. Thomas says, "that man may know without any doubt what he ought to do and what he ought to avoid . . . for it is certain that such a law cannot err."[18] Thus we have the Creator's ordaining Will manifesting Itself through his "moral commandment written in . . . revelation."

The Holy Father also recalls to mind the fact that God's ordaining Will "manifests Itself through . . . the precept . . . of legitimate human authority in the family." The family is the basic unit of society, a unit established in its form by God Himself.[19] It is prior to the state and has fundamental rights and authority which the state must recognize and upon which it must not infringe. Parents hold from nature the right of training their children to whom they have given birth and necessarily have the authority and obligation to govern their households properly.[20] In the just commands of parents to children, God's Will is manifested and right family order is preserved.

Besides the natural law, the divine positive law, and commands issuing from parental authority (not laws strictly speaking), there is need for laws to direct man in the community of the state. For this the natural law is not sufficient. The natural law gives us general norms and precepts, certain common principles, to guide us in proper living. From these there is need to proceed to a more particular determination in certain matters.[21] The divine positive law is also not sufficiently particular. Nor does the authority dwell-

[18] St. Thomas Aquinas, *Summa Theologica*, I-II, q. 91, a. 4.

[19] Pastoral letter of Hierarchy of the United States on "The Christian Family," *The Register*, November 27, 1949, p. 3.

[20] Cf. Pope Leo XIII, Encyclical *Sapientiae Christianae*, *Acta Sanctae Sedis* (hereafter cited *ASS*), 22 (January 10, 1890), 402-4; English translation in *The Great Encyclical Letters of Leo XIII*, (Benziger Bros., New York, 1903), pp. 206-7.

[21] St. Thomas Aquinas, *Summa Theologica*, I-II, q. 91, a. 3.

ing in the family manifesting itself in parental precepts and commands suffice for a full direction of man. The family is an imperfect society in the sense that it is not sufficient in itself for a full development of man's nature in all its propensities.[22] It has need of the grouping of families in the perfect society of the state. Here the members of families meeting with the members of other families easily grasp the idea that if order is to reign, a government is necessary, whose authority and duty is to direct the citizens, the members of the different families, to a proper civil order. To effect and maintain this order and to keep citizens from evil, laws have been enacted. Hence it is we have human positive laws, conclusions and determinations of the natural law, laws which must be reasonable directions to the common good, enacted and promulgated by the rightful authority of the government.[23] If these human laws, these regulatory and directive norms have the proper characteristics of law, i.e., if they are according to reason, relate to the common good, are enacted by rightful authority and are known sufficiently, then they represent, as the Holy Father says, "the ordaining Will of the Creator manifesting Iself . . . through the legitimate human authority in . . . the state."

Another form of human law which the Holy Father mentions as manifesting for us the will of God is the law of the Church. Before Our Blessed Lord left this earth to return to his heavenly home, he established the visible society of his Church whose purpose it is to teach his truths to all nations to the end of time, and to direct and aid her subjects to peace, holiness and eternal life. That the Church might attain this exalted purpose, Christ gave to it the necessary authority, including the power to enact laws for the government of the Christian people in spiritual matters. He said to Peter: "I will give thee the keys of the kingdom of heaven; and whatever thou shalt bind on earth shall be bound in heaven, and whatever thou shalt loose on earth

[22] St. Thomas Aquinas, *Comm. in Lib. I Eth.*, L. I.
[23] St. Thomas Aquinas, *Summa Theologica*, I-II, q. 90, a. 4.

shall be loosed in heaven."[24] And again: "He who hears you, hears me."[25] In the laws promulgated by the legitimate authority of the Church directing us to the highest of ends, we see marked out for us the will of God.

After reviewing all the different types of laws regulating man in his earthly existence, Pius XII concludes that if "human activity controls and directs itself according to these norms, it remains of itself in harmony with the universal order willed by the Creator."[26]

Truly, we have here a good summary, a good picture of the Christian concept of law. We have the general notion of law in itself as an ordering of God's mind and will, as well as mention of all the subsidiary types of law in their proper relation and subordination. In this idea of law one sees clearly how the power and function of the civil law, while having a noble purpose of its own, is, as it were, hemmed in on all sides, limited by the prior principles of the eternal and natural laws and by the prior rights of the family, as existing before it, and by the divinely granted spiritual rights of the Church. If Catholic jurists, judges and lawyers, are to do their work correctly and effectively, they must clearly grasp this Christian concept of law.

Juridical Positivism

But is this concept grasped clearly by all the jurists in the world today? Surely not. Pius XII says there is in the world today the spectacle of a crisis in the administration of justice, that contemporary legal thought finds itself in an inextricable maze of difficulties. What is the cause? Simply this. Many have lost the true concept of law by embracing the legal philosophy of positivism.

According to the theory of knowledge of the positive philosophy, the human mind is limited to a sense knowledge of facts, and to the higher type of organized knowledge of

[24] *Matthew* 16, 19; also 18, 18.

[25] *Luke* 10, 16.

[26] Pope Pius XII, "Address to the Sacred Roman Rota," November 13, 1949, *AAS*, 41 (December 22, 1949), 606.

the relations of facts—their coexistence, similarity and succession. The mind can formulate laws expressing these relations but beyond this it cannot go. The mind must limit its ambition to the discovery of the laws of phenomena. The attainment of a knowledge of efficient causes is impossible. Auguste Comte, called the founder of positivism, in speaking of this, says:

> The first characteristic of the Positive Philosophy is precisely to regard as insoluble by man all these great questions (questions on the origin and end of the universe). In interdicting to our intellect all reseach for first and final causes of phenomena, it limits the field of its work to the discovery of their actual relations.[27]

Commenting on this, one writer says:

> In other words, the concern of philosophy is solely with the discovery of laws, i.e., the constant relations of similarity and succession which bind facts together. All search after causes is regarded as vain. The human mind is incapable of penetrating to causes.[28]

Carried over into the juridical realm, as indeed it was, the positive philosophy taught the existence of positive law only, that is, the existence of such laws as have been enacted by the lawmakers and are on the statute books, or customary laws recognized as such by the state. The positive norm of the state is the supreme norm of law, having no other norm by which it in turn is measured. The simple fact that a certain law has been established as a law is the only criterion by which it is judged. It answers to nothing higher. For the positivist the question of the objective true and false law does not arise, since the law itself lacks an objective unchangeable foundation. The law itself makes and expresses

[27] Auguste Comte, *Système de politique positive* (Paris, 1851-1854); Vol. IV, *Appendice generale*, translated from the French by Richard Congreve (London, 1877), p. 142.

[28] Majorie Silliman Harris, *The Positive Philosophy of Auguste Comte*, (Cornell University, 1923), p. 12.

the right and wrong, the just and the unjust.[29] Justice here, if it may be so called, is relative. To take the lives of persons when they are old and helpless as being useless to society while unjust today becomes just tomorrow if the lawmaker should make it so.

Rommen, speaking of positivism in law, says:

> Positivism declares the search for a moral or a natural basis of the positive laws to be inexpedient. It explains, or perhaps we should say, it describes, laws exclusively as a result of historical factors like race, environment, cultural development, defense of economic interests, class struggles.[30]

And again, in speaking of the positivist concept of sovereignty, he mentions the positivist jurisprudence.

> We should keep in mind that the concept of sovereignty got a new and exaggerated meaning when its earlier systematic surrounding, the idea of its limitation by natural and divine law, vanished with the victory of positivism in jurisprudence and the growth of fervent nationalism in politics. Positivism, afraid of all metaphysics and transcendental ideas, and fond only of realities, produced in jurisprudence the theory that the will of the state is the exclusive producer of law, unlimited by any transcendental idea or teleological or moral idea. It is a secularization of the teachings of Bossuet and other proponents of the divine right theory.[31]

The late Supreme Court Justice Oliver Wendell Holmes was an outstanding positivist in the legal field. He discarded the natural law, holding the jurist who believed in it to be a naive sort of fellow who accepted on "say-so" and without foundation what was merely the familiar and common teaching. For Mr. Justice Holmes the law was nothing more pretentious, nothing more basic, than the prophecy of what the

[29] Cf. Heinrich Rommen, *Natural Law*, transl. from the German by Thomas R. Hanley, O.S.B. (Herder Book Co., St. Louis, 1947), Chapters VI and XIV.

[30] Heinrich Rommen, *The State in Catholic Thought*, (Herder Book Co., St. Louis, 1950), p. 155.

[31] *Ibid.* p. 394.

courts would do in fact. He answers for us the question, what constitutes the law?

> Take the fundamental question, what constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by the law.[32]

On another occasion Justice Holmes said that law is merely "a statement of the circumstances in which the public force will be brought to bear upon men through the courts."[33] Thus we see, for Holmes, law is nothing more than the prophecy of what the courts will do in fact, or a statement of the circumstances in which the courts will bring public force to bear upon men. There is here no objective norm of right and wrong to which the law must conform, no permanent unchanging measure or guide to what law ought to be. There is only relativity.

Such is the teaching of juridical positivism, the cause of the present crisis in law and condemned by the Holy Father. In this concept of law the eternal, natural, divine and Church law have no place, and civil positive law, the will of the lawmaker, whatever form it may take, expressed in laws or decisions of courts, is allowed to go on its own untrammeled, unhampered way, without restriction, without limit, supreme in the legal field.

[32] O. W. Holmes, "The Path of the Law," 10 *Harvard Law Review* 460-461.

[33] O. W. Holmes, *Justice Oliver Wendell Holmes, His Book Notices and Uncollected Letters and Papers*, ed. by Harry C. Shriver (Central Book Co., New York, 1936), p. 157.

Positivism wrongly conceives of man and his regulatory law as having no relation whatsoever with God, Who is the cause of both. We remember how strongly the Holy Father insisted on man's relation to God as a part of man's very nature, and as a basis of the Christian concept of law. He now points out how the denial of that relation is the fundamental error of the positivistic theory.

> The error of modern rationalism consists exactly in the attempt to establish the system of human rights and the general theory of law considering the nature of man as a being standing by himself, to whom there is wanting any necessary reference whatever to a superior Being on Whose creative and regulative will he depends in essence and in action. You know in what an inextricable maze of difficulties contemporary legal thought finds itself encompassed because of this initial deviation. You know how the jurist who has conformed to the standard established by so-called positivism has failed in his work, losing together with the correct concept of human nature, the sound concept of law...[34]

Speaking of the positivistic dictum the "criterion of simple fact," Pope Pius XII says:

> The simple fact of being declared an obligatory norm in the state by legislative power, taken solely by itself, is not enough to create a true law. The "criterion of simple fact" is valid solely for Him Who is the Author and Sovereign Rule of all law, God. To apply it indiscriminately and definitively to a human legislator as if his law were the supreme norm of right is the error of juridical positivism in the proper and technical sense of the word—the error which is at the root of state absolutism and which is equivalent to the deification of the state itself.[35]

[34] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (Dec. 22, 1949), 600; *The Catholic Mind*, 48 (Jan. 1950), 55.

[35] Pope Pius XII, "Address to the Sacred Roman Rota," Nov. 13, 1949, *AAS*, 41 (December 22, 1949), 606; English translation from text issued by National Catholic Welfare Conference News Service, Nov. 14, 1949, p. 3.

The application of this theory since the nineteenth century, says the Holy Father, has indeed had serious consequences upon the society of the world.[36] The totalitarian absolutistic governments of our own day have carried it to its utmost conclusions.[37] Denying God and man's dependence on him, they have used the "criterion of simple fact" and the "legal right or law" to rob whole nations of peoples of their personal dignity and their fundamental rights to life, integrity of limbs, honor and good name, making human beings mere pawns to be used at the discretion of the state. Holding firmly to their positivistic principle, they call "disorder order, tyranny authority, slavery liberty and crime patriotic virtue."[38] Pope Pius XII tells us that the present crisis in the administration of justice, the antagonism between the true and false law, will not be met and overcome without the return of jurisprudence, to its true foundation—the moral order essentially founded in God, his Will, his Holiness, his Being. In light of the present worldwide debacle into which positivism in law has led, Catholic judges and lawyers are constrained to take to heart the words of the Holy Father. They must fully understand the true Christian concept of law and do what they can in upright daily practice in courts and offices, as well as in sound writings, to return the Christian concept to its proper position.

Moral Obligations of Catholic Civil Judges

Having spoken of the contrast between the Christian concept of law and that of juridical positivism, the Holy Father goes on to show how this contrast has been the source of deep anxiety for Catholic judges in their professional life. This anxiety has arisen when they have been faced with the troublesome problem of the application of laws

[36] *Ibid.*

[37] *Ibid;* also cf. Francis P. LeBuffe, S.J. and James V. Hayes, *The American Philosophy of Law,* (4th ed., The Crusader Press, New York, 1947) esp. Ch. VI, pp. 123-148.

[38] Pope Pius XII, *Ibid.*

they know to be unjust. Whereupon he takes the opportunity to speak to them of unjust laws. What he has to say of the moral obligations of the Catholic judge relative to unjust laws and cases of civil divorce is treated at length in Chapters IV and V as the special study of this dissertation.

Reaction to Address

It is interesting to note that the Holy Father's address to the Catholic jurists of Italy was soon spread throughout the world. It received a wide coverage in the newspapers and magazines of our land. The part dealing with the Catholic judge's application of unjust laws and his action in civil divorce cases was quoted at length and commented upon. Editorials appeared with their appraisals. The "legal right" attitude of mind of writers in some quarters made it difficult for them to understand the truth of what was said. An editorial writer of the *Washington Post* interpreted it as applying especially to the law and trial conditions in Communist countries, and at the same time questioned the Pope's authority to speak for Catholic judges in our own land. This writer declared in part:

> In advising Roman Catholic judges throughout the world not to render decisions based on laws that the church considers unjust, Pope Pius XII was undoubtedly striking at the lawless condemnations that pass for trials in Communist countries. . .
>
> Unfortunately, however, the Pope goes beyond this particular situation. His remarks appear to be addressed to Catholic judges in general. "Under no circumstances," he is quoted as saying, "can a judge acknowledge and approve an unjust law (which would not in any case be valid before God)." And in speaking of divorce cases, he said: "A Catholic judge cannot, except for very grave reasons, pass a sentence of civil divorce (wherever divorce is in effect) for a marriage which is valid before God and the Church."
>
> It would be presumptuous to attempt to interpret the obligation, if any, that this pronouncement places on Catholic judges in this country. But the

very fact that the Pope presumes to advise Catholic judges in distant lands where representative government is functioning seems to us most unfortunate. Actually, of course, no judge in the United States has any obligation, as a judge, to any ecclesiastical authority. Our judges obtain their authority solely from the constitution and the law of the land. If any one of them should say that a divorce authorized by the laws of the land could not be granted because of the law of God, he would immediately be confronted by the question of what is the law of God . . .

The judge in this country serves a civil and not a religious function. Any man on the bench who is worthy of the trust imposed in him thinks not as a Catholic, Protestant or Jew but as an impartial judge sworn to uphold the laws that the representatives of the people have enacted. We do not think that the words of the Pope will have any influence upon conscientious American judges of Catholic persuasion.[39]

The underlying thought of this editorial is of the positivistic sort the Holy Father condemns as erroneous. The writer naively implies that, while in Communist lands there can be unjust laws, there can never be such laws in the United States. The constitution and the factual law of our country are set up as norms without peer. The laws of the country must be upheld, even, we gather, if they go contrary to what God Himself has directed or if they invade the spiritual domain which he has given to the true Church.

It might also be said that here and there a cry was raised demanding that Catholic judges vacate their benches if they could not enforce the written laws of our country, even though a specific law might be unjust, at variance with the law of God. Glenn L. Archer, executive director of "Protestants and Other Americans United for Separation of Church and State," was declared to have said that "Catholic

[39] Editorial in *Washington Post*, a newspaper of Washington, D.C., November 9, 1949, Editorial page.

judges should resign promptly if they cannot mete out justice according to the law."[40]

In spots the criticism was burning, acrid, and at the moment made the position of the Catholic judge an unenviable one. These criticisms, however, did not go unanswered, as letters were written and published explaining, clarifying, and defending the Catholic position. Yet, it seems that the issue is not dead, that more could be said. A fuller discussion of the moral obligations of Catholic civil judges is needed, both to state clearly the moral teaching on these matters and to provide the Catholic judge himself with the principles that he needs to know and understand in the daily Christian performance of his high position. Hence the subject is timely and proper for a dissertational investigation.

A Dissertation

The present study of the moral obligations of Catholic civil judges is based on the Holy Father's instruction to the Italian jurists. It does not forget, however, the second mentioned talk, the one to the Rota, which is supplementary to the first and wherein Pius XII goes more into detail in the condemnation of juridical positivism. Consideration will be given also to other allocutions made by the Holy Father to the Sacred Roman Rota, talks which are masterpieces of juristic thought. These addresses treat of many, but not all, of the problems of the Catholic judge. To make the present work complete, other problems and obligations, not mentioned by the Holy Father, but of necessary interest to the judge and his office have been included.

The order found in the Pope's addresses lends itself and the dissertation to an easy division. In the introductory Chapter the contrast between the Christian concept of law and that of juridical positivism has been discussed. Chapter II contains an analysis of the notion of judge as the personification of justice together with a general and brief history of courts and judges. Chapter III treats of the general and

[40] *Washington Post*, November 13, 1949, p. 1.

some specific obligations of the Catholic civil judge. In Chapter IV the question of the Catholic judge relative to unjust laws is discussed, while Chapter V treats specifically of the Catholic judge's handling of divorce cases. The dissertation ends with suitable conclusions.

It is shown that what Pope Pius XII has brought to the attention of jurists the world over is nothing more than the customary teaching of the Church specially applied to our times, and that far from being opposed to the welfare of our land, as some have claimed, it fosters the common good. Important, likewise, is the fact that what the Pope has to say about unjust laws is in conformity with the better element of juristic thought in our country. It is noted also that while a great many modern legalists will not admit the Holy Father's and the Church's teaching concerning divorce and divorce cases, yet they do see divorce's evils and are recommending that something be done to stem the tide of so many divorces yearly granted, and daily productive of so great harm in our land.

CHAPTER II

THE JUDGE THE PERSONIFICATION OF JUSTICE

A. Notion of Judge: Definition

The word *judge* is derived from the latin *judex*, having *judicis* as its genitive form. The word *judicis*, in turn, is formed from two words, *jus*, meaning *right* or *law*, and the root of *dicere*, meaning *to say, to assert*—the whole word meaning *to assert the right*, or *to assert the law*, which is the reflection of rightness.[1] The word itself indicates the notion of judge, for to assert rightness is exactly what the judge is supposed to do. This assertion of rightness on the part of the judge takes the form of a judgment or decision rendered after the hearing or reviewing of a particular case. The judgment itself is the determination of justice in the case considered. Thus we see that judge, judgment and justice are intimately bound together. It belongs to the notion of judge to give judgment which is, in itself, the determination of justice. Hence it is that Aristotle, St. Thomas and Pope Pius XII have spoken of the judge as the personification of justice.[2]

To be able rightly to act as judge one must possess authority to make a decision applicable to the contending parties. Thus the father in the family is rightly a judge, for by his office he has the authority to correct and to punish his chil-

[1] Cf. *Lexicon of the Latin Language*, edited by F. P. Leverett, (Boston: Wilkins, Carter & Co., 1849), *judex*, p. 464 and *jus*, p. 466; *A New English Dictionary on Historical Principles*, ed. by James A. H. Murray (Oxford: Clarendon Press, 1901), Vol. V, p. 617; St. Thomas Aquinas, *Summa Theologica*, II-II, q. 60, a. 1, c.

[2] Aristotle, *Nicomachean Ethics*, V. 4; St. Thomas Aquinas, *Ibid.*; Pope Pius XII, "Address to the Sacred Roman Rota," October 2, 1944, *AAS*, 36 (October 26, 1944), 283; also in T. Lincoln Bouscaren's *Canon Law Digest Supplement Through 1948* (Milwaukee: Bruce Publishing Co., 1949), p. 233.

dren and to judge in their disputes. So also the umpire and referee have authority to make decisions in sports and games. The spectator of a contest might differ violently with the decision of an official, but the spectator's judgment will never prevail, even should it be the correct one, for he is totally lacking in authority. He is not constituted the judge.

Private disputes are often settled when the contending parties mutually give a third disinterested party the authority to judge and to make a decision agreeable to both. Even in these private matters authority is necessary, and one can never act officially as judge unless authority to do so has in some way been given to him. This manner of judge is often called an arbiter.[3]

Of course, in all these instances the one who is constituted the judge is expected to deal fairly with all and to give an honest decision. The term judge, then, in its widest sense means one who with rightful authority renders a just judgment.

When we speak of a civil judge, however, to the above we must add the note "public person." For the civil judge is not privately chosen by the litigants but is the representative of public authority. His judgments are publicly recognized and binding. We must also add the note "court of justice" as the seat of the civil judge's authority. Finally the judge is held to judge according to the law, which if it be a genuine law must be just, since the true notion of law includes its justness. Hence we arrive at the definition of the civil judge as a public person who with rightful authority renders just judgment according to the law in a court of justice.[4]

[3] Ludovicus Wouters, *Manuale Theologiae Moralis* (Brugis: Carolus Beyaert, 1932), I, n. 1130, p. 751.

[4] *Ibid.*; The Hon. Armistead M. Dobie, U. S. Circuit Judge of the Fourth Circuit, in his article, "A Judge Judges Judges," Vol. 1951 *Washington Univ. Law Quarterly* (Dec. 1951) 471-85, says: "The job of the judge, and it is difficult to imagine a more important one, is to resolve human conflicts in the administration of justice under the law."

B. Brief History of Judges

1. Ancient Judical Systems

The notion or idea of judge is as old as the human race itself. In the first pages of revealed truth we read of God, the Divine and Supreme Judge of all, passing sentence upon Adam and Eve who willfully violated a divine command.[5] We read of Cain murdering his brother Abel and receiving a just punishment from the Supreme Judge for his murderous act.[6] In Chapter 18 of the Book of Exodus, we find among the Jews a human ruler and judge appointed by God in the person of Moses, who, at the suggestion of his kinsman Jethro, divided up his arduous and time consuming labors as ruler and judge among able, truthful, God-fearing assistants.

> And the next day Moses sat, to judge the people, who stood by Moses from morning till night. And when his kinsman had seen all things that he did among the people, he said: What is it that thou dost among the people? Why sittest thou alone, and all the people wait from morning till night? And Moses answered him: The people come to me to seek the judgment of God. And when any controversy falleth out among them, they come to me to judge between them, and to shew the precepts of God, and his laws. But he said: The thing thou dost is not good. Thou art spent with foolish labour, both thou and this people that is with thee: the business is above thy strength. Thou alone canst not bear it. But hear my words and counsels and God shall be with thee. Be thou to the people in those things that pertain to God, to bring their words to him: And to shew the people the ceremonies and the manner of worshipping, and the way wherein they ought to walk, and the work that they ought to do. And provide out of all the people able men, such as fear God, in whom there is truth, and that hate avarice: and appoint of them rulers of thousands, and of hundreds, and of fifties, and of tens, who may judge the people at all times. And

[5] *Genesis* 3, 16-19.
[6] *Genesis* 4, 11-16.

> when any greater matter soever shall fall out, let them refer it to thee, and let them judge the lesser matters only: that so it may be lighter for thee, the burden being shared out unto others. . . . And when Moses heard this, he did all things that he had suggested unto him. And choosing able men out of all Israel, he appointed them rulers of the people, rulers over thousands, and over hundreds, and over fifties, and over tens. And they judged the people at all times: and whatsoever was of greater difficulty they referred to him; and they judged the easier cases only.[7]

The judges of the Old Testament were to give judgment according to justice:

> Thou shalt not do that which is unjust, nor judge unjustly. Respect not the person of the poor: nor honor the countenance of the mighty. But judge thy neighbor according to justice.[8]

And again:

> Thou shalt appoint judges and magistrates in all thy gates, which the Lord thy God shall give thee, in all thy tribes. That they may judge the people with just judgment. And not go aside to either part. Thou shalt not accept persons nor gifts: for gifts blind the eyes of the wise, and change the words of the just. Thou shalt follow justly after that which is just.[9]

In the Third Book of Kings we read of Solomon succeeding David as King of Israel, and of his offering sacrifices to God at Gabaon. God was pleased with the sacrifices that King Solomon offered and promised to give him whatever he should ask. Solomon asked not for long life, nor riches, but for wisdom and an understanding heart in the judgment of his people. He received his gift.

> And Solomon said: Thou hast shown great mercy to thy servant David my father, even as he walked before thee in truth, and justice, and an upright heart with thee; and thou has kept thy great mercy

[7] *Exodus* 18, 13-26.
[8] *Leviticus* 19, 15.
[9] *Deuteronomy* 16, 18-20; also 1, 15-17.

> for him, and hast given him a son to sit on his throne, as it is this day. And now, O Lord God, thou has made thy servant king instead of David my father. And I am but a child, and know not how to go out and come in. And thy servant is in the midst of the people which thou hast chosen, an immense people, which cannot be numbered nor counted for multitude. Give therefore to thy servant an understanding heart, to judge thy people, and to discern between good and evil. For who shall be able to judge this people, thy people which is so numerous? And the word was pleasing to the Lord that Solomon has asked such a thing. And the Lord said to Solomn: Because thou hast asked this thing, and hast not asked for thyself long life or riches, nor the lives of thy enemies, but hast asked for thyself wisdom to discern judgment. Behold I have done for thee according to thy words, and have given thee a wise and understanding heart. . .[10]

Our judges today likewise do well always to seek from God the necessary aid and grace to be wise, understanding and just in the performance of their weighty office.

The idea of a just judge is found in all the ancient and modern legal systems. The highly developed and advanced legal systems of the ancient Mesopotamian countries, Babylonia and Assyria, placed the administration of justice primarily on the king. But below the king, as early as 2100 B.C., there was a whole system of courts ruled over by judges whose duty it was to see that justice was done to all.[11]

King Harmhab, a king intensely interested in the administration of justice, ruled in Egypt around 1300 B.C. A long edict issued by him has come down to us. A portion of this edict shows how interested he was in having competent and just judges.

> I have sailed and traveled throughout the entire land. I have sought out two judges perfect in speech, excellent in character, skilled in penetrat-

[10] *III Kings* 3, 7-12.

[11] John Henry Wigmore, *Panorama of the World's Legal Systems* (Washington, D. C.: Washington Law Book Co., 1936), p. 73-75.

> ing the innermost thoughts of men, and acquainted with the procedure of the place and the laws of the court. I have set them one in each of the capital cities, North and South. I have furnished them with the official records and ordinances. I have instructed them in the way of justice. I have said to them, "You shall not take money from one party and decide without hearing the other; for how could you sit as judges upon other men's deeds when one among you is himself committing an offence against justice? The penalty for such an offence shall be death." And I the king have decreed this, that the laws of Egypt may be bettered, and that suitors may not be oppressed. For I the king have in memory the acts of oppression which have been done in the land.[12]

Rameses III in his Domesday Book declaring his rule to have been a just one said, "I have preserved the lives of those who sought my court of justice."[13] The Chief Justice of Egypt had to be a man of unimpeachable character and in the handling of his court have his eyes fixed on justice and truth alone.[14]

The Alexandrian Jew, Philo, writing around the year 40 A.D. in his *De Specialibus Legibus* has a long passage dealing with judges and their qualifications. He maintains that judges should have

> . . . no share in unreasoning passion or in any evil . . . For it would be absurd that those men should be polluted with sins who are deemed worthy of dispensing justice to others . . . For as the power of fire, which dispenses warmth to whatever it touches, had first itself to be constituted as heat, and as, on the contrary, the power of snow, by itself being cold, can cool other things, so the judge must similarly be filled with unimpeachable justice, if he is to irrigate with justice those whom he meets, so that a wholesome river will bear down from a sweet

[12] James Henry Breasted, *Ancient Records* (Univ. of Chicago, 1906) III, 23; Wigmore, *Ibid.* p. 15.
[13] Breasted, *Ibid.*, IV, 120; Wigmore, *Ibid.*
[14] Wigmore, *Ibid.*, pp. 12, 13, 52.

spring upon those who thirst for the fine order of law.[15]

In every legal system, be it Hebrew, Mesopotamian, Egyptian, Chinese, Greek, Roman, English or any of the others, or be it only the customary laws of tribal peoples not established in elaborate systems or set down in codes, in all, we find a person or persons set up as judge among the people whose duty and office it is to render justice.[16] As to what was just in particular cases, ideas may have differed according to the enlightenment, learning and customs of the different peoples. Nevertheless, in all we find the general idea of basic justice and the judge as the administrator of that justice in disputed cases.

Man is naturally a social being.[17] If he is to perfect his nature, he must live in society with others. Wherever we have a society, we must have government. And wherever government, there must of necessity be judges to determine the true meaning of the laws passed in their application to particular cases, to settle disputes and contentions about rights and duties arising among the citizens. Hence it is we find among nations and peoples, ancient and modern, the general idea of judge, as a public person empowered to settle disputes with just decisions.

2. Judicial System in the United States

The founding fathers of our own United States of American knew the necessity of a strong judiciary system for the welfare of our country. Accordingly, in the Constitution, after establishing in Articles I and II the legislative and executive branches of the governmental system to make and

[15] Philo Judaeus, *De Specialibus Legibus*, cf. Philo in Loeb Classical Library, Book IV, 9, 55-57; also Erwin R. Goodenough, *The Jurisprudence of the Jewish Courts in Egypt* (New Haven: Yale Univ. Press, 1929), p. 189.

[16] Cf. Wigmore, *op. cit.*, Chapters on the different legal systems; also, H. H. Urteaga, "La organizacion judicial en el Imperis de los Incas," *Revista Historica* (Lima, 1928) 9, pp. 1-50.

[17] St. Thomas Aquinas, *Comm. in Lib. I Eth.. L.I.*

to enforce the law, they proceeded in Article III to set up the judiciary to decide cases and controversies. The opening words of this Article are the following: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish."[18]

The Constitution thus provides for a Supreme Court, but it leaves the organization of that body entirely up to Congress. Congress was to determine the number of judges making up the court, its judicial procedure, as well as to establish such inferior courts as were deemed necessary for the nation's welfare. Acting according to the power given to it, in 1789, Congress passed the Judiciary Act which provided for the organization of the Supreme Court, which established inferior circuit and district courts, and which fixed in a general way the procedure of all these courts. This act together with the changes made in it by a Congressional act of 1911 and the revision 1948 form the structure of our federal judicial system.

Today in the federal government of the United States, besides the Supreme Court as highest, we have eleven circuit courts of appeals, and eighty-seven district courts,[19] having jurisdiction over certain kinds of cases mentioned in the Constitution.[20] The Supreme Court is the court of final appeal for all cases of federal jurisdiction except those for which special courts have been established. In its present state it is composed of a Chief Justice and eight Associate Judges all of whom are appointed by the President with the approval of the Senate. The eleven circuit courts of appeals have from three to nine judges each, with three judges usually required for a hearing of cases. They are appeal courts only, hearing no cases of first instance, only cases appealed from the lower district courts. The district courts usually are presided over and in charge of one judge with a number

[18] *Constitution of the United States*, Article III.
[19] Title 28, *United States Code*.
[20] *The Constitution of the United States*, Article III, Section II.

of court personnel in assistance. Each state in the Union has at least one district court, with the most populous states having several. The district court is a court of first instance, holding two or more sessions each year, sometimes within different cities within the district. As in the case of the Supreme Court, the judges both for the circuit courts of appeals and the district courts are appointed by the President with the approval of the Senate.

Besides these principal divisions, the federal government of the United States has established some special courts such as: the United States Court of Claims, to handle suits of citizens against the United States government; United States Customs Court, to settle questions of valuation and duties with regard to tariff laws; the Tax Court of the United States, to decide controversies arsing out of internal tax laws, and finally, the United States Court of Customs and Patent Appeals, to hear appeals of customs and patent cases. Special judiciary bodies have also been set up to handle matters in Hawaii, Alaska, Puerto Rico, the Canal Zone and the Virgin Islands. The above is a very brief outline of the federal court system in the United States.[21]

In addition to the federal courts established by the federal government, which have as their purpose the decision of cases and controversies arising under federal laws, each of the several states has its own system of courts to decide cases and controversies arising under the laws of the state. These state courts have full jurisdiction and immunity from interference in their own fields, that is, in all cases not mentioned in the Constitution as belonging to federal jurisdiction. Each state establishes whatever courts it deems necessary for its self-government, regulates these as it sees fit, and arranges either for the appointment or election of judges to preside over them. As in the case of the federal

[21] Claudius O. Johnson, *Government in the United States* (4th ed., New York: Thomas Y. Crowell Co., 1949), Chapter 17, pp. 455-482; William Bennett Munro, *The Government of the United States* (5th ed. New York: Macmillan, 1946), Chapters 24, 25, pp. 547-589.

courts, here also there are three general divisions or grades.

The lowest grade of state courts are the local, state and municipal courts ruled over by the justices of the peace, magistrates and other variously called inferior officers. Such courts have jurisdiction over relatively minor civil and criminal cases, and appeals go from them to the next highest court. While local courts are the lowest in jurisdiction, yet they are the most numerous and indeed not the lowest in importance. For in them is heard by far the greatest number of cases, and it is from his treatment on these courts that the ordinary person forms his opinion of the justice of judicial processes in our land.[22]

The next higher range of courts are commonly called county courts but are also given other titles. Sometimes they are called appellate courts, district courts, superior courts, courts of common pleas. These are the lowest courts that keep a complete written record of all proceedings and hence are called lowest courts of record. These courts receive and hear cases appealed from the lower state and municipal courts and are courts of first instance in many civil and criminal cases.

Between the county and supreme court some states have established intermediary courts in order to lessen the flow of too large a number of cases to the supreme court. In these states, cases appealed from the county courts go first to the intermediary court and end there, unless appealed again to the supreme court. The supreme courts of the various states have very little original jurisdiction, their work being confined almost entirely to the hearing of appeals.

States have also established such special courts as probate courts, to handle wills, estates, guardianships and inheritances; land courts, to investigate and to register property titles; and courts of claims, to which are sent private suits against the state.[23]

[22] Munro, *op. cit.* p. 730.

[23] Munro, *op. cit.*, Chapter 44, pp. 728-743; Johnson, *op. cit.*, Ch. 18, pp. 483-525.

To all these courts, both federal and state, judges have either to be appointed or elected. There has been a great deal of controversy as to which is the better way of choosing judges, appointment or election. Both systems have their merits and demerits. Both have succeeded in giving us judges worthy of their position, and both at times have had their failures.[24] At present all federal judges are appointed, but most state judges are elected by popular vote.

Scattered throughout this vast country of ours, as well as in other countries, from lowest to highest, there is truly a very large number of courts of justice. It is to the welfare of our land and to the welfare of each and every nation that capable, skilled and just men occupy the benches of these courts, where they sit in judgment of their fellowmen.

[24] *Election Versus Appointment of Judges, The Reference Shelf Series* (compiled by Lamar T. Beman, New York: H. W. Wilson Co., 1926).

CHAPTER III

GENERAL OBLIGATIONS OF JUDGES

A. Dignity, Responsibility and Importance of the Judge

Truly the office of judge is one of great dignity, responsibility and importance. Pope Pius XII, as already has been mentioned, spoke of the dignity of the profession of jurist, finding that dignity and nobility to rest in the very work done by the jurist, in his perfecting, safeguarding and restoring the rights of man, in helping to maintain civil peace and order, and in the knowledge of human and divine things which the proper conduct of his office requires.[1] Experience shows that the citizens themselves respect this office and hold in high repute even the lowest rank of judge who has aquitted himself well in the duties of his office. But they heap scorn upon and have little respect for him who has betrayed both office and citizens with court mismanagement and injustice.

The judge's responsibility is likewise measured by the work he is required to do. What greater responsibility is there than to sit in judgment upon one's fellowman, to sit in judgment upon a human being made like to the image of God, and possessed of a supernatural destiny? As these people in turn, one after the other, appear before the judge's tribunal to attend to legal matters, to contest civil suits or to answer to criminal charges, their happiness, rights and duties, property, liberty, and in some cases even life itself, depend upon his judgment. A moment's solemn reflection on the judge and his work convinces one of the responsibility

[1] Cf. *supra*, p. 3; also Pope Pius XII, "Address to the Sacred Roman Rota," October 2, 1945, *AAS*, 37 (October 25, 1945), 256; Bouscaren, *Canon Law Digest Supplement Through 1943*, p. 207.

of this position. Grave, therefore, is the obligation of the judge to examine cases well, so that justice be done to all and injustice to none.

Vastly important for the welfare of our country is the position of judge, for if just judges rule over our courts, the citizens will understand and have confidence that their natural human rights will be here protected. It is commonly agreed that the judicial branch of the government, more so than the legislative and executive branches, stands in need of wise and just personnel. The welfare of the land is safeguarded if the judges are able and virtuous men. Since the beginning of our country, we of the United States have been blessed in the general type of men who have held the position of judge. While corruption and incompetency have frequently seeped into the executive and legislative branches, yet rare have been the proved cases of deliberate injustice and fraud on the part of the judiciary. Jurists themselves understand fully how much the welfare of our land depends on judicial justice, as is evidenced in these words of the Honorable John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit.

> There can be no such thing as a peaceful society in the absence of an impartial judiciary to settle controversies on the basis of what is just and right and to direct the power of the state in the enforcement of law.[2]

And Pius XII says, "Awful indeed are the dignity and power of the judge, which, whether in deciding controversies or repressing crimes, must rise above all passions and prejudices and reflect the justice of God Himself. Such is in fact the object of all judgment, the purpose of all judicial power, ecclesiastical and civil."[3]

[2] Hon. John J. Parker, "The Judicial Office in The United States," 23 *New York University Law Quarterly Review*, (April, 1948), 225.

[3] Pope Pius XII, "Address to the Sacred Roman Rota," October 2, 1945, *AAS*, 37 (October 25, 1945), 256; Bouscaren, *Canon Law Digest Supplement Through 1948*, p. 207.

B. Necessary Qualities of the Catholic Judge

1. Knowledge

Let us now go on to see what are the obligations and duties of judges. First of all there is required of the judge the intellectual ability, knowledge and prudence which will enable him rightly to perform the duties of his office. Pius XII says this knowledge must be of both human and divine things. Of the jurist and therefore of the judge he says:

> He must know, above all, Divine things, (*Divinarum rerum notitia*) . . . because without this higher knowledge of Divine things, the human panorama, which is the second more immediate object (*humanarum rerum notitia*) which the mind of the jurist must dwell on, would remain without that foundation which surpasses every human vicissitude in time and space and rests in the absolute in God.[4]

The judge, therefore, must have a knowledge of the true Christian concept of law and its purpose. He must see man in his true nature, not merely as an earthly social being needing regulating laws, but as a person in his rational nature created like to God's image, possessed of certain definite God-given rights no man can take from him, and destined to a supernatural end. He must understand that civil law, over which he as judge presides and which he applies, is not a law to itself, supreme in its field, but that it is rather subject to the higher laws of God spoken to man, and the laws God himself has implanted in man's nature. The jurisprudence of our day has fallen into error with its juridical positivism, its absolutistic, its utilitarian, its purely historical and sociological explanations, its relativistic concepts of law rejecting anything higher. Catholic jurists who in their legal training have imbibed and accepted such false concepts have the solemn obligation to understand the falsity of such teachings and to set themselves aright with a knowl-

[4] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," November 6, 1949, *AAS*, 41 (December, 22, 1949), 597; *The Catholic Mind*, 48 (January 1950), 55.

edge and understanding of the Christian concept. The Catholic judge must apply in his court of justice the true Christian concept that civil law has its foundation and norms in the higher divine positive and natural law.[5] The Catholic judge must fully realize that the judicial order is bound to the moral order essentially founded in God.

Besides this true concept of law and its purpose, the judge is required to possess an adequate knowledge of the existing civil law, plus the ability to interpret it properly. In addition, he must be able prudently to apply it to the cases coming before his tribunal.[6] "We will not make any justices, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it," says the Magna Charta.[7] Most states require by statute that their judges be learned in the law.[8] In the cases he hears the judge comes in contact with people from every walk and circumstance of life. It would serve him well, in fact, it is almost a necessity, for him to have a working knowledge of the social sciences, such as sociology, history and economics. Morally speaking, he must have the requisite knowledge to fulfill his office.

Ordinary knowledge of a skilled judge is generally sufficient for the usual run of cases. When, however, intricate and involved cases of law and fact arise, the judge is obliged to give them special thought and study. On this question Father Connell says the following:

> When confronted with a case involving complicated problems, it is the solemn obligation of the judge to make a thorough study of all the relevant principles and precedents. If, after a conscientious effort, the judge passes a decision which subsequent events prove to have been erroneous, he has at least the assurance that he has done no formal wrong. But if he neglects to give sufficient time

[5] Cf. *Supra*, pp. 4-13.

[6] Januario Bucceroni, *Institutiones Theologiae Moralis*, (ed. 4 Rome: Italy, 1900), II, p. 3.

[7] *Magna Charta*, XLV.

[8] *Corpus Juris Secundum*, Vol. 48, p. 965.

> and effort to the study of the case, he is guilty of culpable ignorance, and he is bound to make restitution to those who have suffered material loss because of his negligence. The thought of the great harm he might cause by such blameworthy laxity should induce every conscientious judge to familiarize himself with all the angles of the cases brought before him.[9]

One who seeks or accepts a judgeship without sufficient knowledge sins gravely against legal justice, since he seeks an important office he cannot properly fulfill, and against commutative justice, because of the proximate danger he runs of causing notable harm to others.[10] Moreover, should damage result to others while he exercises his office, he is bound in conscience to restitution insofar as the harm should have been foreseen and caused by his lack of knowledge.[11] Such a Catholic judge could not be absolved in the Sacrament of Penance unless he had either the firm purpose of giving up his office or of attaining adequate knowledge. If it is possible, he should abstain from acting as judge while he is attaining the necessary knowledge. If he cannot abstain, in the meantime he is held in his decisions to seek the knowledge and advice of men learned in the law.[12]

There is one more point to consider in this matter of the judge's knowledge. If through no fault of his own he should inflict damage on another by a wrong decision because of imperfect knowledge or inadvertance to particular facts, he is not bound to restitution, if the damage is irreparable, since he is not guilty of moral evil. However, if the harm can be repaired he is bound in justice and in charity (if it can be done without grave inconvenience), to make the error known to the injured party and to counsel him to appeal his

[9] Connell, *Morals in Politics and Professions*, p. 27.

[10] St. Alphonsus, *Theologia Moralis*, IV, 192, 195; Wouters, *Manuale Theologiae Moralis*, I, n. 1131, p. 751.

[11] Augustinus Lehmkuhl, *Theologia Moralis*, (Friburgi Brisgoviae: Herder, 1914), I, n. 960, p. 536.

[12] Bucceroni, *op. cit.*, p. 3; B. H. Merkelbach, *Summa Theologiae Moralis*, II, n. 636, p. 669.

case or show him some other way by which the fault may be corrected.[13]

2. Integrity

The whole work and purpose of the judge and his court is to see that justice is done to all. Perhaps then the most distinctive and basic quality of all required of the judge is his integrity, that he be a lover of justice, and be guided by the firm purpose of administering justice in every case he hears. In the Book of Deuteronomy we read: "Hear them, and judge that which is just, whether he be of your own country or a stranger. There shall be no difference of persons. You shall hear the little as well as the great. Neither shall you respect any man's person because it is the judgment of God."[14]

Across the top of the stately Supreme Court building in Washington, there are four largely written and deeply engraved words, truly indicative of the proper spirit and function of our courts—"Equal Justice Under Law." Our courts are set up for justice; the citizenry have a right to it; judges have the serious obligation of rendering it in their decisions. The judge, therefore, is seriously obliged to be honest, to be a man of perfect and incorruptible integrity. "Above all things integrity is their portion and proper virtue."[15] As an honest judge he must examine every case impartially and without prejudice and render a decision in keeping with the facts presented in testimony. He must make a real effort to put aside biased, partial, and prejudicial inclinations. He must not prefer, nor favor one person above the other, nor permit his just opinion to be influenced by love, friendship, kinship, entreaties, hatred, threats, unjust criticisms, conveniences or inconveniences, public clamor, desires of popularity or notoriety, the pressures of political

[13] Merkelbach, *Ibid.*

[14] *Deuteronomy* 1, 16-17.

[15] Bacon, "Essay of Judicature," quoted in *Canons of Judicial Ethics*, cf. McKinney's, *The Consolidated Laws of New York, Annotated*, Book 33, p. 674.

parties and other groups, by gifts, by bribes or personal interest—removing himself from the case should there be a danger of undue influence. In court cases in our land because of existent prejudices the judge must be especially cautious not to discriminate against the Negro, nor to show favoritism to the party or persons who are responsible for his election or appointment. Speaking of the integrity required of the judge, one writer says:

> Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge. It has been pointed out elsewhere that due process of law requires a hearing before an impartial and disinterested tribunal. Every litigant, including the state, in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge, and the law intends that no judge shall preside in a case in which he is not wholly free, disinterested, impartial and independent.[16]

In his article on "The Judicial Office in The United States," Judge Parker says:

> To discharge properly the duties I have outlined, the judge must be a man of character and ability. I put character first. No man can be the sort of judge we expect an American judge to be unless he be absolutely honest, absolutely courageous and blessed by God with an understanding heart. By being honest, I mean he must have, not merely financial, but intellectual honesty. By courage, I mean not merely physical bravery, but also the moral courage to do right in the face of unpopularity or ridicule or danger or at the cost of personal loss or sacrifice. And a judge should be a kindly man. An understanding heart was the gift of God asked by the ancient king; and it is the gift above all others the judge should pray for. The bench is no place for a cruel or a callous man, whatever other qualities or abilities he may possess.[17]

[16] *American Jurisprudence*, Vol. 30, p. 767.

[17] Hon. John J. Parker, "The Judicial Office in The United States," 23 *New York University Law Quarterly Review*, 227.

The worthy judge is a virtuous man, firm and courageous in his will to give to each what is his due. It is a position no one should seek unless he realizes he possesses the necessary intellectual and moral virtues. "Seek not to be made a judge unless thou have strength enough to extirpate iniquities: lest thou fear the person of the powerful and lay a stumbling block for thy integrity."[18]

a. The Judge and Gifts

The judge ought not to accept gifts of any sort from those who are concerned with cases pending or being tried before him. This is necessary to keep his integrity above suspicion and to safeguard himself from the possibility of showing favor. For gifts have the natural effect of inclining one to favor the donor and thus endanger the process of justice. In theory it is possible for the judge to accept gifts from litigants without permitting himself to be influenced in his verdict by such gifts. In practice, however, the following of such a procedure would in all probability lead to injustice, or at least beget suspicion of unfairness in the public mind.

The judges of the Old Testament were forbidden to accept gifts because these are obstacles to justice. "Thou shalt not accept persons nor gifts, for gifts blind the eyes of the wise, and change the words of the just."[19]

The Canon Law of the Church forbids ecclesiastical judges and other court officials to accept gifts of any kind from interested parties on the occasion of a trial.[20] The natural law itself forbids the judge to accept such gifts as would cause him to be unjust in his decisions.

While the civil law of the United States expressly prohibits conspiracy to obstruct justice on the part of its officers and citizens,[21] and the acceptance of bribes by any of its judges,[22] yet it does not expressly forbid the judge's ac-

[18] *Ecclesiasticus* 7, 6.
[19] *Deuteronomy* 16, 19.
[20] *Codex Juris Canonici*, Canon 1624.
[21] *United States Penal Code*, Title 18, § 371.
[22] *United States Penal Code*, Title 18, § 207.

ceptance of pure gifts, that is, gifts given with no intent or attempt to influence his judicial action in any way. Even lawyers and judges themselves, however, counsel against this acceptance. Speaking of the ideal judge the Bar Association of New York says: "A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment."[23] Without doubt it is best and most in keeping with the spirit of impartiality, and justice if no gifts whatsoever are accepted.

Gifts or presents accepted by the judge are customarily divided into two classes. The first class are gifts of mere liberality, those spontaneously given by the litigants to the judge before or during the trial, with no demand, agreement or intention of influencing his decision. Such gifts can be small and unimportant, or sizable and hence important. Moral theologians agree that small unimportant gifts of this sort can *per se* be accepted by the judge without fault, since these would seem to have no effect in the eliciting of an unjust sentence.[24] Yet, even small gifts can be dangerous. It is best to refuse them absolutely if they are offered. Their innocent acceptance can be misinterpreted and give rise to charges of dishonesty. Prudence will dictate when it is proper, if ever, for the judge to accept such gifts.

Spontaneously given gifts of importance and worth ought never to be received by the judge from litigants. Even if this type of gift be presented with the best of intentions and free from any attempt to bribe and are accepted with like frame of mind by the judge, yet, they are totally out of place. Of its very nature an important gift could cause the judge unconsciously to show favor to one party. There is always too the possibility of scandal. The innocent acceptance of this type of gift would very readily give rise to misinterpretation, and if publicly discovered would call down a cloud of

[23] *Canons of Judicial Ethics*, cf. McKinney, *The Consolidated Laws of New York*, Annotated, Book 29, p. 682.

[24] Noldin-Schmidt, *Summa Theologiae Moralis*, II, n. 721, 2, p. 664.

suspicion upon the integrity of the judge and his court proceedings. For the public eye sees only the external action of a litigant in a trial presenting the presiding judge with a sizable gift, and no matter how honorable the judge's previous reputation, suspicious thoughts arise in men's minds, as the practical explanation seems to be:—"Here is an attempt at bribery." Should the final judgment in the case favor the donor, there is even more cause for suspicion, and the proven acceptance by the judge of a sizable gift from the successful litigant could be construed as evidence of conspiracy or bribery and provide grounds for like charges, with resulting scandal.

Just what, then, are the moral obligations of the judge regarding his acceptance of an important gift? Does the judge commit sin in accepting such a gift? If so, what kind of sin? And against what virtue? *Per se* the judge's acceptance of such a gift is not illicit; *per accidens*, it can be illicit.

Considering the action in itself, we say it is not illicit, because the action of the judge's receiving the gift with no intention of undue influence on either side is not an evil action. The judge is merely the recipient of a gift with no intentions of injustice or harm being done to anyone. Nor is any civil law broken, as in our country there is presently no civil law forbidding the judge's acceptance of pure gifts. If there were a law to this effect, it would seem to bind in conscience.

However, *per accidens* it can be illicit, when the judge places himself in the proximate occasion of sin, as often might happen, or when, as nearly always happens, he acts imprudently in accepting the gift because of the possibility of scandal, and consequent harm being done to the common welfare. Even though at the time of receiving the gift, he has no intention of permitting it to influence him, if he knows that the acceptance will later influence him to an unjust decision, he is not permitted to accept the gift. He sins gravely if he does so, for he exposes himself to the proximate danger of both legal and commutative injustice, of not

fulfilling his office and of inflicting grave harm on others by an unjust decision. In such a case he is required to return the gift before the judgment, to rid himself of the undue influence. If he keeps the gift, but renders a just judgment, he is not held to restore to anyone, since commutative justice in the external order is not violated. If, however, his judgment is unjust, he commits an external act against the virtue of justice. He is not required to return the gift, but he is required to repair the damage caused by the unjust sentence.

Most judges are well aware of the danger they run in accepting from litigants a gift of the type of which we are speaking. There is almost always present the possibility of scandal if the acceptance of the gift should become publicly known. He lays the way open for serious charges to be brought against him. Therefore, in almost every instance the judge who accepts such an important gift commits at least a venial sin and possibly a mortal sin against the virtue of prudence,[25] for knowingly he exposes himself to the very real danger of ruining his own good name, that of his family, of bringing great harm to the cause of the courts and justice in general, of breaking down the confidence of the people in their government, and finally, of being a stumbling block to the cause of Christ. Holding a public office of high rank, the Catholic judge should be circumspect and beyond reproach, careful to avoid any occasion or action which might reflect badly upon his Catholic faith.

If for personal reasons, for example, as a customary token of personal friendship, a litigant feels constrained to present the judge with a gift and the judge feels that he must accept it, let this be done only after the trial is over, and let it have no connection whatsoever with the decision. The writer in American Jurisprudence, speaking of this matter says: "After action has been taken on a matter, a public official concerned therein is not guilty of bribery in accept-

[25] *Summa Theologica*, II-II, q. 53, a. 1. c.

ing a gift of money or other property from one interested in the action, provided there was no prior corrupt understanding."[26]

At this present time, as I have said, there is in the United States no statutory law forbidding the civil judge to accept pure gifts. It may be, however, that some such laws will be passed in the future. Should this be so, insofar as these laws would prohibit the acceptance of important gifts, they would bind in conscience,[27] for indeed they would be important laws, and their violation could result in harm to others and in possibly serious scandal. The judge, therefore, in accepting an important gift contrary to law would sin at least venially, and possibly mortally. Before passing judgment in the case, he is obliged to return the gift; after the judgment, he is obliged to restore the gift only after a judicial sentence demanding it.[28]

b. The Judge and Bribes

While statutes in the United States do not expressly prohibit the judge's acceptance of pure gifts, yet common law, federal law and state laws do forbid the public official's acceptance of a bribe. Both law and the complete integrity of the judge require that he have no commerce whatsoever with bribery.

Bribery is defined in the *Corpus Juris Secundum* as:

> . . . the voluntary giving or offering to, or the acceptance by, any public officer or official, of any sum of money, present or thing of value, to influence such officer or official in the performance of any official duty required of him, or to influence him to act contrary to known rules of honesty or integrity. Bribery is an offense against public

[26] *American Jurisprudence*, Vol. 8, p. 888.

[27] Merkelbach, *op. cit.*, I, n. 287, p. 257.

[28] Merkelbach, *op. cit.*, II, n. 636, p. 670; Thomas A. Iorio, S.J., *Theologia Moralis*, (ed. 3, Neapoli, M. D'Auria, S. Sedis Apostolicae Typographus, Italy, 1946), II, n. 953, p. 562.

> justice, the gist of the crime being the wrong done to the people by corruption in public service.[29]

The bribe then, we note, is something of value offered to, or accepted by, a public officer precisely with the intention that his official action be influenced in some way. At common law bribery is merely a misdemeanor but in some instances a misdemeanor of a grave nature.[30] In the United States it has been regarded a crime of so serious a nature as to be made a felony by statute in many jurisdictions. The federal law prohibiting the judge to accept a bribe reads as follows:

> Whoever, being a judge of the United States, accepts or receives any sum of money or other bribe, present or reward, or any promise, check, order, contract, obligation, gift or security for the payment of money, because of or with intent to be influenced in any opinion, judgment or decree in any suit, controversy, matter or cause pending before him, shall be fined not more than $20,000 or imprisoned not more than fifteen years, or both; and shall be disqualified from holding any office of honor, trust or profit under the United States.[31]

Whereas the above quoted law forbids the judge's acceptance of a bribe, the federal code also has a law of almost like wording which forbids the direct or indirect offering of a bribe, with provision for the same punishment. The severe maximum penalty which the law provides, in each case a $20,000 fine, fifteen years imprisonment, or both, plus disqualification from office for the judge who accepts a bribe, manifests the seriousness with which the federal government views any attempt on the part of its judges or citizens to interfere with court justice by the acceptance or offering of a bribe.

[29] *Corpus Juris Secundum*, Vol. 11, p. 840.
[30] *American Jurisprudence*, Vol. 8, p. 886.
[31] *United States Penal Code*, Part I, Ch. 11, Title 18, § 207, cf. United States Code Congressional Service, 80th Congress, Second Session, New Title 18, United States Code, Crimes and Criminal Procedure, (St. Paul, Minn., West Publ. Co.; Brooklyn, N. Y., Edw. Thompson Co.).

The states likewise have passed laws prohibiting the offering or acceptance of a bribe by state officials, including judges. In the states also severe penalties have been provided for the violation of the law. For example, in New York the acceptance of a bribe by a public officer is punishable "by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both." A conviction carries with it disqualification from holding public office.[32] Pennsylvania punishes this crime with a fine not exceeding one thousand dollars, or imprisonment for five years, or both.[33]

To hold public office is to occupy a position of trust. It is a most despicable crime for a public officer to misuse, or for any citizen to suggest that he misuse, his public office for private gain. "To solicit a bribe, to accept a bribe, strikes at the very foundation of the honesty and integrity of public offices."[34]

Never is it permitted to the judge to demand or to accept bribes. The judge who does so in most cases sins mortally by breaking an important positive law which binds in conscience. He sins also against legal justice in not properly fulfilling his office. This too could easily become a mortal sin. He sins against the virtue of religion in violating the sanctity of his oath of office, an important oath.[35] If any acutal injustice is done to another because of the bribe, he sins against commutative justice by denying to each what is his due. The gravity of this sin is measured by the harm done.

Besides being sinful, the judge's acceptance of a bribe carries with it certain obligations of restitution. If in consequence of a bribe the judge renders a favorable decision,

[32] McKinney, *The Consolidated Laws of New York,* Annotated, Book 33, Part I, Penal Law, Art. 34, § 372, p. 180.

[33] Purdon, *Pennsylvania Statutes Annotated,* Title 18, § 4303.

[34] *Corpus Juris Secundum,* Vol. 11, p. 840, note 2; From v. State, 173 NE., 201, 204, 36 Ohio App. 346.

[35] Herbert Jone, O.F.M. Cap., *Moral Theology,* (Westminster, Md., The Newman Bookshop, 1945), n. 187, p. 125.

which in itself is the just one, which he would have done anyway, he is bound nevertheless to restore the bribe to the person who gave it, because he has sold a judgment which he was already bound to render by reason of his office. He is already being paid a just stipend for faithfully fulfilling his office, and is not permitted to receive his pay a second time.[36]

When the judge has accepted a bribe for rendering a favorable decision which in itself is unjust, he is held before passing the judgment to return the bribe and thereby to rescind the unjust agreement. He should then proceed to act according to the facts and justice. If he has already passed the unjust sentence, he is permitted by most moralists to keep the bribe according to the principles of the "contractus turpis,"[37] unless restitution is compelled by a judicial sentence. The judge is, however, held to repair whatever damage he may have caused to a third party by his unjust decision, although his obligation is secondary to that of the person who won the case. Speaking of this Father King says:

> The ideal solution, if it could be arranged, would be to have the individual unjustly awarded the decision surrender his unjust gain to the other litigant and in return he would receive back the bribe that he had paid to the judge.[38]

The same principles apply to the case wherein the judge accepts a bribe for issuing an unjust court order, or for performing any unjust judicial action. Before the order is issued, or the action is performed, he must return the bribe. After issuing the order, or performing the action, he is permitted to keep the bribe, since he has filled his part of the contract, even though it is an evil one, but he is obliged,

[36] Merkelbach, *op. cit.*, II, n. 636c, p. 669.

[37] Dominicus M. Prummer, O.P., *Manuale Theologiae Moralis*, (ed. 10, Barcelona: Herder, 1945), II. n. 253, p. 215.

[38] William J. King, *Moral Aspects of Dishonesty in Public Office*, (Washington, D. C., The Catholic University of America Press, 1949), p. 108.

to repair whatever damage has been done to other parties, although his obligation in this respect is secondary to that of the person who is benefited by the wrongful act.

Some theologians have maintained that without violation of justice the judge might accept a gift for trying one case before another when both have equal right.[39] Other theologians,[40] however, deny this, pointing out that the judge in these circumstances is bound in fulfilling his office to choose freely the case to be tried. It is very difficult to see how such a gift could be classed as a pure gift, at least in the United States. Obviously it influences the judicial action of the judge in his official capacity, and therefore, according to our laws, is to be classed as a bribe. Whether it be classed as a gift or a bribe, it leads to an act of discrimination and hence is not permitted. As we have said, the judge in the first place, is bound in the ordinary fulfillment of his office to choose justly between the two. And secondly, in choosing the one case before the other because of a gift or bribe, he violates commutative justice in denying the other case the right it has to the chance of being chosen for an early hearing.[41]

The question has been raised whether for the acceptance of a gift or money, the judge could favor one side in a civil suit when he could fairly favor either. Here again in the United States, the acceptance of such a payment is contrary to the law against bribery, since judicial action is thereby influenced. Never is it permitted in this case to accept a gift or bribe, the reasons being the same as those given in the previous paragraph. The judge is already bound by reason of his office to render a just judgment in the cases coming before him for settlement and if the judge accepts a gift or bribe for favoring the one party, he unjustly denies to the

[39] Cf. Laymann, *Theologia Moralis*, Lib. 3, Tr. 4, C. 4, n. 9.

[40] Cf. de Lugo, *De justitia et jure*, Disp. 37, n. 136; Gury-Ballerini, *Compendium Theologiae Moralis*, (Rome, Ex Typographia Polyglotta S.C. De Propaganda Fide, 1887), II, p. 5.

[41] Merkelbach, *op. cit.*, II, n. 636, p. 670.

other the chance he has of receiving the decision.[42] Pope Alexander VII condemned the proposition that the judge could accept money for favoring one party when both have on their sides equally probable opinions.[43]

Since in our land the acceptance of such gifts or money intended to influence judicial action is to be regarded as the acceptance of a bribe, the sin and restitution involved will follow the principles laid down for bribery. If the judge accepts a bribe of this sort, he sins against the civil law, legal justice, the virtue of religion, and commutative justice. Before passing judgment, he must return the bribe. After the judgment, he may keep the bribe, but is bound to repair any harm done.

Really the best solution of all the problems of the judge relating to gifts and bribes, is for the judge not only not to accept them in the first place, but even to prefer charges immediately against those attempting the bribe. The judge should be mindful of the dignity, importance and responsibility of his position, ever thoughtful of the high integrity his office demands. He should never be thought of as one ready to betray his office, as one ready to lend a willing ear to those seeking his and his office's corruption by the offering of gifts and bribes. The people must have belief and trust in the honesty of the judiciary. While in some instances their trust and belief have been misplaced, generally our judges have proved to be honest men. It should always be so. That it may always be so, all judges should so act in their offices that not the least cloud of suspicion be raised in men's minds calling into question their uprightness and integrity.

3. Jurisdiction

a. Necessity of Jurisdiction

In addition to the necessary knowledge, prudence, and

[42] de Lugo, *De justitia et jure*, Disp. 37, n. 136.

[43] Henricus Denzinger, C. Bannwart, and J. Umberg, *Enchiridion Symbolorum Definitionum et Declarationum de Rebus Fidei et Morum*, (21-23 ed., Friburgi Brisgoviae: Herder & Co., 1937), n. 1126.

integrity, the judge must also have jurisdiction, that is, the lawful right, power, authority, competence or commission by which he is able to act as a lawful public superior over the cases brought before him, and to render decisions that are publicly binding. One cannot just take the office to himself, as he wills. He must be placed there by proper authority, appointed or elected and qualifying in the manner prescribed by law. Should he set himself up as a judge in a court when he has no right or authority, he is an usurper, rendering decisions absolutely invalid and unjust. St. Thomas speaks clearly of this:

> Now since it belongs to the same authority to interpret and to make a law, just as law cannot be made save by public authority, so neither can a judgment be pronounced except by public authority, which extends over those who are subject to the community. Wherefore even as it would be unjust for one man to force another to observe a law that was not approved by public authority, so too it is unjust, if a man compels another to submit to a judgment that is pronounced by other than the public authority.[44]

Civil law is exact in outlining the manner in which its judges are to be selected and installed. It is definite also in the extension and limitation of their jurisdiction in office.[45] The judge, therefore, will make it a point to fulfill the requirements of the law, so that no doubt will exist about his authority in his judicial position. While in office he will exercise only such judicial functions and powers as are authorized by constitution and statute, being careful never to exceed limitations.[46] Before acting in particular cases, he will assure himself of his proper competency.

The judge lacking jurisdiction renders invalid decisions,[47]

[44] *Summa Theologica*, II-II, q. 60, a. 6; q. 60, a. 2, c.

[45] Title 28, United States Code; Cf. e.g., *Constitution of Kentucky*, The Judicial Department, § 109-44; also *Kentucky Revised Statutes*, Title IV, Judicial Branch, Chapters 21-26, pp. 176-235.

[46] *Corpus Juris Secundum*, Vol. 48, pp. 1005-1022.

[47] Noldin-Schmidt, *op. cit.*, II, n. 720b, p. 663.

unless perchance his incompetency is voided in some manner by the supplying of jurisdiction and he is considered "de facto" a judge. He who knowingly and willingly usurps a judgeship, or a judge who willingly declares himself competent in a particular case when he knows he is not competent, commits what is usually a mortal sin[48] against justice, because of the importance of the power usurped and the harm done to the rightful judge. If jurisdiction is not supplied and the intruding judge actually tries cases in his court, he sins also against justice and usually mortally, because of the harm he does and the trouble he causes in bringing witnesses into court, and in exposing the litigants to a decision which could be declared invalid and hence not enforceable. Should actual harm result to individual persons because such a decision is later declared null and void, the intruding judge is bound to make restitution for the damage done. Even if jurisdiction is perchance supplied to him in the cases he tries, he still sins because he exercises an office not rightly his. If, however, such a judge has seriously made up his mind to vacate the office as soon as it can be done, he is permitted in the meantime, for the public good, to try cases coming before him.[49]

b. Incompetency of Civil Judges in Ecclesiastical Causes

The discussion of the competency required of the judge

[48] Authors differ in judging the gravity of this sin. Noldin-Schmidt, in the place noted above, says the judge in these circumstances "is able to sin gravely," *graviter peccare potest.* Harding, in his article "True Justice in Courts of Law" (*Summa Theologica,* English translation, American Edition, Benziger Bros., New York, 1948, Vol. III, p. 3346) says: "he sins gravely against the judge whose power he usurps, against the party suffering an adverse decision, especially if force has been used against that party and possibly against other cited persons." Lehmkuhl declares (*Theologia Moralis,* Vol. I, n. 960, p. 536) "Jurisdictionis defectus quaenam peccata secum trahat, maxime considerari debet in iis, qui *supremam* potestatem usurpatione tenent: quamquam etiam minoribus officiis simile quid accidere *potest.*" We have thought it best to class the sin as *usually mortal,* as it would be in most cases, but allowing for the possibility of light matter.

[49] Lehmkuhl, *op. cit.,* p. 537.

for the validity of his actions brings us now to a consideration of the civil judge's relation to the Church, and his incompetency in ecclesiastical causes. The Catholic Church is a perfect society established by Christ, true God and true man, for the purpose of teaching, governing and sanctifying mankind. She has the duty to care for man's spiritual welfare and to lead souls to heaven. Having established his Church for a definite purpose, Christ also gave to it the necessary means and power to attain that purpose. Divinely established, the Church has a right to exist, to protect and to direct itself in attaining its purpose by institutions and laws in accordance with her nature. In the words of Pope Leo XIII, the Church,

> is not an association of Christians brought together by chance, but is a divinely established and admirably constituted society, having for its direct and proximate purpose to lead the world to peace and holiness. And since the Church alone has, through the grace of God, received the means necessary to realize such end, she has her fixed laws, special spheres of action, and a certain method, fixed and conformable to her nature, of governing Christian peoples.[50]

Christ, Our Lord, he who fulfilled the prophecies, who made prophecies of his own and fulfilled them, who by claim, by words and works showed himself to be what he said he was, the Son of God, thus speaks to his apostles. "All power in heaven and on earth has been given to me. Go, therefore, and make disciples of all nations . . . teaching them to observe all things that I have commanded you; and behold I am with you all days, even unto the consummation of the world."[51] "He who hears you, hears me."[52] "As the Father has sent me, I also send you."[53] "And I say to thee, thou art

[50] Pope Leo XIII, *Sapientiae Christianae, ASS.*, 22 (1889/90) 395; *The Great Encyclical Letters of Leo XIII*, (New York: Benziger Bros., 1903), p. 195.

[51] *Matthew* 28, 18-20.

[52] *Luke* 10, 16.

[53] *John* 20, 22.

Peter, and upon this rock I will build my Church, and the gates of hell shall not prevail against it. And I will give thee the keys of the kingdom of heaven; and whatever thou shalt bind on earth shall be bound in heaven, and whatever thou shalt loose on earth shall be loosed in heaven"[54] And to Peter, "Feed my lambs . . . Feed my lambs . . . Feed my sheep."[55] And to the Pharisees, "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's."[56]

There is not, therefore, the least shadow of a doubt about Christ's establishment of his Church, nor of the power with which he invested it. The Church has a divinely given right to exist, to rule, to make laws for the attainment of her divinely given purpose. She has need to make laws for the spiritual protection and welfare of her subjects. More, she is commanded to do so. No civil power or temporal authority has a right to deny to the Church, nor to infringe upon, the rights God Himself has given to her.

c. Church and State

The question of the relation of Church and state is today a much discussed, vastly important, and widely misunderstood problem. Yet, the fundamental principles basic for a correct understanding of this relation can easily be shown. In the state and Church we have on the earth existing side by side two perfect societies, both established by the Creator Himself, but in different ways—the first, the state, flowing of very necessity from the nature of man for his proper temporal development, and the second, the Church, founded by Jesus Christ, the Son of God, as a necessary means of man's attaining his eternal destiny. Each has its own reason for existing; each has its purpose to attain and the authority

[54] *Matthew* 16, 18-20; Also to the other apostles, "Amen I say to you, whatever you bind on earth shall be bound also in heaven; and whatever you loose on earth shall be loosed also in heaven." *Matt.* 18, 18.

[55] *John* 21, 16-17.

[56] *Matthew* 22, 21.

and means to attain it. The state is interested especially in man's temporal welfare; the Church, primarily in his spiritual life, in securing heavenly and eternal values. Each is sovereign in matters pertaining to its own field, but in those matters in which both have common interest and authority, the Church is superior by reason of its superior end. Neither obeys or is subservient to the other within the limits of its own proper authority. Distinct and separate, they travel along together through the years, each trying to the best of its ability to do the work it is supposed to do. Yet, while distinct and separate, while their ends and purposes are essentially different, they are not mutually antagonistic or severed from each other. As Pius XII puts it:

> This last difference based on the end . . . does not, however, deny all union between the two societies, and much less does it interpose between them a cold and unfriendly atmosphere of agnosticism and indifference. One who would thus misunderstand the true doctrine that the Church and State are two distinct perfect societies, would be mistaken. He could not explain the many forms of union between the two powers which, both in the past and in the present, have been fruitful though in varying degrees; he would above all be losing sight of the fact that the Church and the State arise from the same source, that is, from God, and that both are concerned with the same object, man, his personal dignity, natural and supernatural.[57]

Both Church and state are interested in man, but under different aspects. Man, however, cannot be divided into parts; he must be treated as a unit, and while the state is especially concerned with his temporal welfare, it must also recognize the fact that he is destined to eternal life. The Church, concerned primarily with bringing man to everlasting happiness, cannot at the same time be unaware of his temporal requirements. Their common interest in man, whole and entire, and his welfare, should direct Church and

[57] Pope Pius XII, "Address to the Sacred Roman Rota," October 29, 1947, *AAS*, 39 (November 7, 1947), 495; Bouscaren, *Canon Law Digest Supplement Through 1948*, p. 215.

state to mutual understanding, mutual aid and cooperation, so that man, who is subject to both, can better reach the goals, mediate and final, that God has set for him.[58] Pope Leo XIII has this relation set down succinctly in the following words:

> Yet no one can doubt that Jesus Christ, the Founder of the Church, willed her sacred power to be distinct from civil power, and each to be free and unshackled in its own sphere: with this condition, however,—a condition good for both, and of advantage to all men—that union and concord should be maintained between them, and that of those questions which are, though in different ways, of common right and authority, the power to which secular matters have been intrusted should happily and becomingly depend on the other power which has in its charge the interests of heaven.[59]

Truly does the Church have the power to make laws for the guidance and direction of her subjects. Through the centuries she has done so in matters over which she has jurisdiction. In her *Codex Juris Canonici*, promulgated May 27, 1917, the Church revised, recorded and brought up to date the then extant body of ecclesiastical legislation. This *Code of Canon Law* is a complete, authoritative, authentic, well-ordered and meaningful system of laws for the Latin Church. It became effective May 19, 1918, and is the body of law which rules the faithful today.

d. Canon 1553—Ecclesiastical Jurisdiction

Cognizant of the divinely given spiritual duty and right with which Christ has invested her, the Church in Canon 1553 of the *Code of Canon Law* declares her inherent and exclusive right to jurisdiction over the following cases: (1) Cases relating to spiritual matters, and temporal matters so connected with the spiritual that they cannot be sep-

[58] Pope Leo XIII, *Sapientiae Christianae*, *ASS*, 22 (1889/90) 395 sqq.; *The Great Encyclical Letters of Leo XIII*, p. 195 ff.

[59] Pope Leo XIII, *Arcanum Divinae*, *ASS*, 12 (1879/80) 403; *The Great Encyclical Letters of Leo XIII*, p. 78.

arated from them. Examples of cases relating to spiritual matters are: those concerning faith and morals, the Sacraments and sacramentals, Mass, divine worship, sacred rites, prayers, indulgences, ecclesiastical feasts, vows, oaths, obligations of clerics, ecclesiastical offices and jurisdiction. Examples of temporal matters joined to the spiritual are: benefices, parishes, dioceses, administration of ecclesiastical property and betrothals.[60] (2) Cases dealing with the violation of ecclesiastical laws, and all other actions in which sin is involved, to the extent of pronouncement of blame and the infliction of ecclesiastical penalties. (3) Contentious and criminal cases of persons enjoying the *privilegium fori*, that is, the privilege of having their cases tried before ecclesiastical judges. Clerics, religious, including lay religious and novices, and the members of other ecclesiastical societies of men and women leading a community life with vows, are mentioned in the *Code* as enjoying the privilege of the forum.[61] And finally (4) the Church declares that in cases of mixed forum, cases in which both civil and ecclesiastical courts are competent, for example, dowry, damages for breach of promise, crimes against marriage such as adultery, and bigamy, theft of ecclesiastical goods, perjury, and blasphemy,[62] that court is to hear the case into which it is first brought.

It is proper, fitting, respectful and beneficial to the good order of both Church and state for persons and causes which are in a special way identified with the Church to be tried before ecclesiastical tribunals. It must be remembered, moreover, that the Church's right to hear the above cases according as she has them stated in her law is a divine right

[60] Udalricus Beste, *Introductio In Codicem* (ed. 3, St. John's Abbey Press, Collegeville, Minn., 1946), Prolegomena, n. 57, a; Harding, *op. cit.*, p. 3347; Vermeersch-Creusen, *Epitome Juris Canonici*, (ed. 6, Mechliniae-Romae: H. Dessain, 1946), Tomus III, n. 7, p. 6.

[61] *Codex Juris Canonici*, Canons 120, 614, 680.

[62] Beste, *op. cit.*, proleg. n. 57 a, p. 49; Ayrinhac-Lydon, *Marriage in the New Code of Canon Law*, (Benziger Bros., New York, 1941). p. 353.

and independent of public authority. The state has not given this right to the Church, nor is it by the permission of the state that she exercises it. The Church possesses it by reason of her origin, nature and purpose. She has received it from Jesus Christ, the Son of God.

The Church, therefore, has divinely granted jurisdiction over the above stated cases and persons to the extent she has defined in her law. Concerning her jurisdiction over spiritual things, things temporal annexed to the spiritual, her power over violations of the ecclesiastical law to the extent of pronouncing guilt and applying ecclesiastical penalties, there can be no doubt. These are hers of necessity, so very closely are they united with her high spiritual purpose. Almost every country, if not by law, at least in practice, recognizes the Church's competency in these matters.

A civil judge is incompetent in their regard, and if he calls them into his civil court, or hears them when others have brought them, he cannot but render invalid decisions. In addition to rendering invalid decisions, the civil judge who is knowingly and willingly guilty of disregarding the law of the Church and hearing ecclesiastical cases in his court, sins against justice, because he usurps another's power and does harm by the invalid decision. He also sins against religion in doing harm to its cause and in showing contempt for proper religious authority.[63] Both sins are objectively grave. The judge, therefore, will not take it upon himself to assume competency in ecclesiastical causes. Should the judge hear of a layman initiating such a case in a civil court, if he can do so without grave inconvenience the judge should direct him to see the proper ecclesiastical authorities. Should the judge himself in fulfilling his office be faced with the hearing of such a case, he should bring this matter to the notice of his pastor or consult the Chancery

[63] Noldin-Schmitt, *Summa Theologiae Moralis*, II, n. 720b, p. 663; Harding, "True Justice in Courts of Law," cf. *Summa Theologica*, (English translation, American Edition, Benziger Bros., New York, 1948), III, p. 3346.

office of his diocese for a proper course of action. In order to make the position of Catholic judges tenable the Church will sometimes, when necessity demands and prudence dictates, cede her rights in such cases and grant jurisdiction to try a case which of itself belongs to ecclesiastical courts.[64]

e. *Privilegium Fori*

While most countries generally recognize the Church's jurisdiction in the above mentioned spiritual matters, some countries do not recognize the *privilegium fori*. Yet the Church has seen fit formally to establish it by legislation as her right based upon the divine positive law, as necessary for the fitting attainment of the Church's high and holy purpose, and as expressing a centuries-old recognition of the authority of the Church and the dignity of the person and office of those who devote themselves to religion in giving their lives to Christ for mankind.

The need for such a law is clearly seen today in its violation. For in our own day we have witnessed the shocking spectacle of the avowed enemies of the Church dragging her high dignitaries before peoples' courts on trumped up charges, in order to belittle and to discredit them and the Church in the eyes of the world, and to work what they hope is grave harm to the cause of Christ.[65]

Canon 120 of the Code treats more fully of the *privilegium fori*. This canon says in its first paragraph that in all contentious or criminal cases clerics are to be summoned before an ecclesiastical judge, unless lawful provision to the contrary has been made for particular places. It goes on to say in paragraph two that Cardinals, Legates of the Holy See, Bishops, Abbots, and Prelates nullius, the highest superiors of religious societies of pontifical law, and the major officials of the Roman Curia in matters pertaining to their office, may not be summoned before a lay judge without permission of

[64] T. Slater, *A Manual of Moral Theology*, (New York: Benziger Bros., 1908), I, p. 587.

[65] Cf. Bouscaren, *Canon Law Digest Supplement Through 1948*, pp. 261-64.

the Holy See; and that other clerics, such as priests, deacons, subdeacons, clerics in minor order and those having received tonsure, religious, novices, lay brothers and others having the privilege of the forum, may not be summoned into a lay court without permission of the Ordinary of the place where the case is to be tried. However, the Ordinary is directed not to deny permission without a just and grave reason, especially if the plaintiff is a layman and the Ordinary's efforts to arrange a settlement between the two parties has failed.

In paragraph three of Canon 120, the Code further says that if the above persons, nevertheless, are summoned by parties who have not received the proper permission, they may by reason of necessity and to avoid greater evils obey the summons. They must, however, notify the superior from whom the permission should have been received.

In order to impress upon the faithful the seriousness with which the Church guards this privilege, she has attached to its violation certain penalties. These penalties are listed in Canon 2341. According to this Canon, if anyone in violation of Canon 120 should dare to cite before a lay tribunal one of the Cardinals, Legates of the Apostolic See, or one of the major officials of the Roman Curia in matters pertaining to their office, or one's own Ordinary, he incurs by that very fact excommunication reserved in a special manner to the Apostolic See. If one dare to cite a Bishop, Abbot or Prelate *nullius*, or the highest superior of a religious institute approved by the Holy See, he incurs excommunication reserved simply to the Holy See. Finally, if without having obtained the permission of the Ordinary, a cleric should cite before a lay judge any other person enjoying the privilege of the forum, he by that very fact incurs suspension from office reserved to the Ordinary. If a layman should commit this offense, he is to be punished by the Ordinary with suitable penalties.[66]

As can be seen from the law and its penalties, the general intention is for clerics always to come before ecclesiastical

[66] *Codex Juris Canonici*, Canon 2341.

tribunals. Yet the Church knows that at times special reasons and circumstances may exist for trying clerics in public courts. In view of this, the Church at times has entered into concordats and agreements with different countries by which the *privilegium fori* has been abrogated, as for example, in Austria, Costa Rica and Columbia. In other countries modification of the privilege has been effected by long standing contrary custom or by tacit tolerance on the part of the Holy See, as for example, in Germany, Belgium and France.[67]

Even in those countries where the privilege is recognized and in effect, the Church allows clerics to be summoned into a lay court provided the proper permission has been received. For high ranking prelates, as is noted in the Canon, this permission must come from the Holy See; for other clerics permission must be received from the Ordinary. According to the interpretation of the law, permission is needed for citing the above persons only as defendants in contentious suits and as accused in criminal trials, but is not needed to cite them as witnesses.[68] According to another Canon, however, the cleric ought not to appear as a witness in a lay criminal trial where a grave personal penalty is involved, except in case of necessity.[69]

Since the *privilegium fori* is not an absolute necessity for the Church in the attainment of its holy purpose, it can be modified or abrogated by the Church, as we have seen. This has been done when necessary in some countries. What is the status of the privilege in the United States? It is true that the government of our land gives no official recognition to the *privilegium fori*, though in many places in practice there is present a prudent respect for it. On the other hand, there is no evidence that the Church has abrogated this privilege in the Unted States. In fact, the evidence is to the contrary. In Providence, Rhode Island, in 1928, some Cath-

[67] Beste, *op. cit.*, p. 179.
[68] Bouscaren-Ellis, *Canon Law*, p. 103; Ayrinhac-Lydon, *Penal Legislation*.n. 275, p. 214.
[69] *Codex Juris Canonici*, Canon 139, 2.

olic laymen cited their Bishop to appear in court as a defendant regarding some of his official acts. They did this without the required permission of the Holy See and were aware of the attached penalty. When the question was later asked of the Sacred Congregation of the Council whether or not these laymen had incurred the penalty of excommunication, the reply was that they had.[70] In this case the *privilegium fori* was violated. If the Church had renounced the privilege of the forum for the United States, or if custom in our land had set it aside, then no penalty would have been incurred.[71]

Since the law is in effect in the United States, the Catholic civil judge will give it consideration and be conscious of the duties it places upon him. First of all, if it ever falls upon the judge in fulfilling the duties of his office freely to cite a cleric into court as a defendant or accused, he should first receive the required permission from the Holy See or from his own Ordinary as the case requires. It may be that custom in the United States has modified the *privilegium fori* to the extent that in cases of minor importance (such as traffic violations), and involving a cleric of lower rank, the judge could proceed without having recourse to ecclesiastical authorities.[72] The delay and inconvenience involved would usually be sufficient to excuse the judge from seeking permission in cases of this type. Cases involving high ecclesiastical authorities, or cases of lower order clerics involving serious charges, are cases of great importance. In these it is necessary for the judge to seek the required permission before entering a summons.

Should the judge knowingly and willingly be guilty of freely bringing clerics into court in a case of great import-

[70] Sacred Congregation of the Council, 1928, *AAS*, 20 (May 4, 1928), 146; Bouscaren, *Canon Law Digest*, I, p. 855.

[71] Ayrinhac, *Penal Legislation in the New Code of Canon Law*, n. 279, p. 217.

[72] Connell, *Morals in Politics and Professions*, p. 34; J. Aertnevs-C. Damen, *Theologia Moralis*, (14 ed., Torino: Marietti, 1944), I, n. 1234, pp. 867-68.

ance without proper permission when no reason of necessity presses him to do so, and he could easily avoid the case, he sins gravely against justice in usurping authority and in denying the cleric his right, and against religion, because of the harm done in violating the *privilegium fori*. He also incurs the penalty of Canon 2341—either excommunication or suitable penalties given by the Bishop, according to the rank of the cleric he summoned.[73]

Most frequently, however, such cases are not begun by the judge himself, but they come before the court, brought there by others through proper judicial procedure. A layman or cleric files suit or charges against a cleric; proper procedure is followed. A summons is issued by a proper official and the cleric is brought into court. The judge had nothing to do with summoning the parties. His duty is to hear the cases coming before him. The necessity of his office forces the case upon him. What should a Catholic judge do when faced with such a case? It seems the first thing to do would be to inquire if the necessary permission has been obtained. If it hasn't, the judge should remind the plaintiff to obtain it. Should the plaintiff fail to do so, the Catholic judge ought to consult with his pastor or the Chancery office of his diocese to learn the proper mode of procedure, for here again is a question of jurisdiction. If recourse to ecclesiastical authority is impossible, if necessity demands, and if grave harm, such as the danger of the loss of his judgship and consequent harm to others and society, should result to the judge because of his refusal to take the case, moralists would permit him to accept it. The ecclesiastical law is not thought to bind in this case.[74]

Some authors maintain that when the judge is ordered by the civil law to handle cases involving clerics, he ordinarily does not sin gravely, if though having the opportunity he omits to seek permission.[75] Speaking of this Harding

[73] Noldin-Schmitt, *op. cit.*, n. 720b, p. 663.

[74] Noldin-Schmitt, *op. cit.*, n. 720, p. 663; Cf. *Codex Juris Canonici*, Canon, 2205, 2.

[75] *Ibid.*

says: "But can we suppose that ignorance, adopted custom, public law adjoining upon him the hearing of all cases referred to him, often coalesce to excuse him at least from mortal sin? Authors before the Code have thought so, and there is no reason for now insisting upon a contrary opinion."[76] Lehmkuhl adds that often because of ignorance no sin is committed.[77] Yet we cannot be too lenient in this matter. Should a Catholic judge be consciously aware of his duty in an important case and have the opportunity to seek the required permission, which when necessary is quickly granted, for him to omit to do so might be a grave matter and hence a mortal sin. The Catholic judge ought to seek the necessary permission and be sure of his jurisdiction.

C. Obligations Relating to Judicial Procedure

There are a number of problems and obligations of the judge relating to judicial procedure. First, the judge has the obligation to proceed according to the established laws of judicial procedure and to arrive at a decision consonant with the just laws of the land. The judge is not free to conduct the cases in his court arbitrarily, as he wills. Civil law is quite definite in its procedural rules, which the judge must follow.[78] In the selection of the jury, in the pleadings of counsel before judge and jury, in the examination of witnesses, in allowing and disallowing objections, in the admission of evidence, in the charge to the jury, in rulings concerning motions, in pronouncing sentence, in fact, in the entire gamut of judicial proceedings, from the beginning of the case to its final disposition, the judge must see to it that legal limitations and regulations are strictly kept, that proper court order is observed and that the cause of justice is rightly served. He must see to it that each person having a part

[76] Harding, *op. cit.*, p. 3346.
[77] Lehmkuhl, *op. cit.*, n. 960, p. 537.
[78] Cf. *Corpus Juris*, Vol. 33, pp. 959-74, § 79-106; *Kentucky Revised Statutes, 1942*, (ed. by Robt. K. Cullen, published by the Kentucky Statute Revision Commission), Title IV, Judicial Branch, Chap. 21-26, pp. 176-235.

in the proceedings, whether as plaintiff, defendant, accused or witness, is given the rights accorded to him by law. In both civil and criminal trials, whether in giving judgment based on constitutional, statutory, or common law or natural justice, or in issuing decisions from courts of equity, the judge must accord to each person concerned the opportunity fully to present his case, so that all pertinent evidence and circumstances may be gathered, the facts known, and a just judgment obtained. In all procedural actions the justice of the judge must be unquestionable.

Should the judge knowingly and willingly fail to concede to any person a right which the law guarantees and protects, should he not abide by procedural laws, or should he give a decision contrary to a just law, he commits sin against legal justice, since he does not properly fulfill his office. Too, he offends against commutative justice, in doing harm to the individual whose right he has violated. The gravity of these sins will depend upon the importance of the act and the seriousness of the harm done. The fault against commutative justice demands restitution. And if grave harm has been done it demands restitution under the pain of mortal sin.

It has been said above that the duty of the judge is to proceed and to give judgment according to the *just* laws of his community. We speak here of *just* laws, since the judge cannot be held to give judgment in accordance with laws manifestly unjust. Morally speaking, an unjust law has not the character of law. It may have the formal appearance of law, having been enacted in legislative procedure. But it is not a reasonable direction to the common good, and as such is not enforceable. Sometimes the judge is held not to pass judgment according to it. Of the judge and the unjust law we shall speak at length in the next chapter.

Some theologians say the judge is only *regularly* obliged to give decisions according to the just laws of the country.[79]

[79] Wouters, *op. cit.*, n. 1135, p. 752; Aertneys-Damen, *op. cit.*, n. 1230, p. 864.

They use the word *regularly* for they envision occasions when the judge would not have the duty of strictly following the written law, as for example when the written law, though validly established and just, contravenes or offends in a particular instance against a natural right. St. Thomas speaks of this:

> Even as unjust laws by their very nature are, either always or for the most part, contrary to the natural right, so too laws that are rightly established, fail in some cases, when if they were observed they would be contrary to the natural right. Wherefore in such cases judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view. Hence the jurist says: "By no reason of law, or favor of equity, is it allowable for us to interpret harshly, and render burdensome, those useful measures which have been enacted for the welfare of man." In such cases even the lawgiver himself would decide otherwise; and if he had foreseen the case, he might have provided for it by law.[80]

Obviously no just law is intended by the lawgiver to work injustices. It is meant as an aid, an ordering for the good of the community. The lawgiver, however, cannot always make laws to fit every possible case and circumstance, and hence the application of a law at times may be hurtful to the common good directly, or indirectly by working an injustice upon individual citizens. St. Thomas speaks of this again when he says:

> Now it happens often that the observance of some point of law conduces to the common weal in the majority of instances, and yet, in some cases is very hurtful. Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore if a case arise wherein the observance of the law would be hurtful to the general welfare, it should not be observed.[81]

[80] *Summa Theologica*, II-II, q. 60, a. 5, ad. 2.
[81] *Ibid.*, q. 95, a. 6.

Now the work of the court is justice, and in a case of this sort wherein the giving of judgment according to the statute will harm the general welfare or visit injustices on individual persons thereby indirectly hurting the common good, it is reasonable for the judge to find a better basis upon which to settle the case than a statutory law which is not meant for this instance. The judge, therefore, in such a case is not obliged to give decision according to the statute. He ought to settle it according to the common law or natural justice, or see that it goes to a court of equity. Many today do not admit this principle, holding strictly to the position that the judge must decide according to substance of the law itself,[82] even though an injustice is done. Sometimes, too, in minor cases, an individual is morally required to submit to such a judgment for the common good.[83] Nevertheless it was precisely conditions of this kind that gave rise to the establishment of the English courts of equity,[84] in which our own equity courts find their basis.

If it is demanded of the judge to give decision according to the statute because of attendant circumstances, he should make the judgment as light as possible, and advise the losing party of another way, if this can be done, to seek a remedy from the injustice done to him. If the sentence rendered must be severe, then the whole matter is to be settled according to the principles applying to unjust laws.

The judge has the further duty to give decision according to his public knowledge, according to what he has learned in his public position as judge, according to what has been alleged and proved in court. He must not judge according to his private knowledge or views. He judges as a public person, not as a private person. Theologians are one in maintaining this point as a general principle. Many of them quote St. Thomas, who says: "It is the duty of the judge to

[82] Wouters, *op. cit.*, n. 1124, p. 752.

[83] *Summa Theologica*, II-II, q. 96, a. 4, ad 3.

[84] Johnson, *Government in the United States*, p. 494; Zechariah Chaffee, Jr. and Sidney Post Simpson, *Cases on Equity* (Langdell Hall, Cambridge, Mass.; Publ. by editors 1934), p. 1.

pronounce judgment in as much as he exercises public authority, wherefore his judgment should be based on information acquired by him, not from his knowledge as a private individual, but from what he knows as a public person."[85] St. Thomas goes on to say the judge may use his privately gained knowledge to help him the better to sift the evidence presented and to discover its weak points, but that his final decision must rest solely upon what has been presented in the public judicial procedure.[86] Civil law too provides for judgment to be rendered according to evidence presented.[87]

Two questions arise as the result of this principle. First, what is the judge to do, who by private knowledge knows an accused person to be guilty who juridically has been proved innocent? The answer is well made by Father Connell: "It is the unanimous teaching of Catholic theologians that even in the event that a judge knows from some extrajudicial source that the defendant is guilty, he must decide in favor of acquittal if the evidence alleged in the trial is not sufficient to establish certain proof of guilt."[88] It is contrary to the common good to condemn a person as guilty without sufficient external proof. The judge who convicts such a person merely because of private knowledge sins mortally against legal justice, in not properly fulfilling his office. He sins against commutative justice in inflicting harm upon the defendant. This latter sin will be mortal or venial depending on the gravity of the harm done.

Should the judge foresee that a real and grave harm will result to the state if such a person is not convicted, he is obliged from legal justice and at the cost of grave inconvenience to disqualify himself as judge and to present himself as a witness in the trial,[89] or to declare a mistrial and to offer himself as a witness when the case is retried. The judge

[85] *Summa Theologica*, II-II, q. 67, a. 2.
[86] *Ibid.* ad 4.
[87] *Corpus Juris Secundum*, Vol. 49, pp. 103-105.
[88] Connell, *op. cit.*, p. 26.
[89] Noldin-Schmitt, *op. cit.*, n. 740, p. 677.

is also held in charity, apart from grave inconvenience, to present himself as a witness if it is necessary in order to avert grave harm to his neighbor.[90] Civil law permits the judge to act as witness[91] and the cause of justice would be better served in the above cases if the judge would disqualify himself and let another judge take over while he acts as witness.

Secondly, what ought a judge to do when he knows with certainty by private knowledge that a person is innocent, who has been or is in the process of being declared guilty because of evidence presented in court? The judge is obliged to do all that he can to secure the freedom of this person. For he is bound in charity, just as others, to do what he can to prevent a grave and unjust evil coming upon his neighbor. He ought to have recourse to legal technicalities, to resort to expedients of procedure, to sift the evidence more carefully, to examine the witnesses more minutely, to delay the case if this is helpful, to transfer the case to another court, and finally if conviction follows, to leave the way open for an appeal.

If the judge is unsuccessful in exhausting his efforts to save the innocent person and the verdict of guilty is brought against him, it is a controverted question whether or not the judge can pass sentence upon the innocent person, even to the penalty of death.

> If a judge knows that a man who has been convicted by false witnesses, is innocent he must, like Daniel, examine the witnesses with great care, so as to find a motive for acquitting the innocent: but if he cannot do this he should remit him for judgment by a higher tribunal. If even this is impossible, he does not sin if he pronounces sentence in accordance with the evidence, for it is not he that puts the innocent man to death, but they who stated him to be guilty.[92]

[90] *Ibid.*
[91] *Corpus Juris Secundum*, Vol. 48, p. 1068.
[92] *Summa Theologica*, II-II, q. 64, a. 6, ad 3.

Thus does St. Thomas and others[93] following him teach that the judge is always able to give judgment in every case according to what has been alleged and proved in court. There is, however, another opinion exactly opposite, held by St. Bonaventure, which says it is intrinsically wrong for a judge to condemn a person he knows is innocent, and the judge is never permitted to do so.[94] A third opinion, a medium between the two, holds that in civil cases and in less important criminal cases, in which the penalties fixed are fines, not too long imprisonment, exile or deprivation of office, the judge is permitted to condemn the innocent person on the basis of the evidence against him in court. The reason given is that the private good of the individual is thought to yield to the common good, so that the judicial order which contributes much to the peace and order of the community may not be contemned. Those holding this third opinion would not permit the judge to condemn the innocent in major criminal cases, in which capital punishment, mutilation, life imprisonment or relatively long imprisonment is inflicted as a penalty. Society is not authorized to inflict such severe penalties upon an innocent person even for the sake of the common good. St. Alphonsus,[95] de Lugo,[96] Henry Davis,[97] Iorio[98] and others hold to this view.

Which of these three opinions ought the judge to follow? St. Alphonsus himself gives the note of "probable" to the first two and the same note can likewise be given to the third.[99] Because of the authority and reasons given by those who offer the different opinions, in practice one would be

[93] Merkelbach, *op. cit.*, n. 637, p. 671; Genicot-Salsmans, *Institutiones Theologiae Moralis* (ed. 10, Bruxellis: Alb. Dewit, 1922), II, n. 6, p. 8.

[94] St. Bonaventure, Cf. Joannes Petrus Gury, *Compendium Theologiae Moralis*, (ed. 9, Romae: Ex Typographia Polyglotta), II, p. 14.

[95] St. Alphonsus, *Theologia Moralis*, IV, n. 208.

[96] de Lugo, *De justitia et jure*, disp. 37, sect. 4. n. 43.

[97] Henry Davis, *Moral and Pastoral Theology*, (ed. 4, New York: Sheed & Ward, 1943), IV, p. 376-377.

[98] Iorio, *op. cit.*, n. 952, p. 561.

[99] St. Alphonsus, *op. cit.*, IV, n. 208.

permitted to follow any of the three. Therefore we state these conclusions. First, following the opinion of St. Bonaventure, and the maxim "Ne poena sine crimine," the judge is never obliged to condemn an innocent person. Wernz suggests the judge holding this opinion ought to decline to judge in the case.[100] Second, following the opinion of St. Alphonsus and the others, the judge, after exhausting attempts to free him, is permitted for the common good to condemn the innocent person in civil and minor criminal cases where a severe penalty is not inflicted, but not in major criminal cases with severe penalties. Third, following the opinion of St. Thomas, the judge is permitted to condemn the innocent person even to death. In practice, however, as de Lugo concludes, very rarely in our day would a judge who knows the innocence of a convicted person be unable to free him.[101] In our own United States, the judge possessing private knowledge of a condemned person's innocence could easily disqualify himself as judge and offer to be a witness before the judge who replaces him. Or he could see that the case is appealed to a higher court and there appear as witness. In those cases where grave harm will result to his neighbor, the judge is obliged in charity to appear as witness, if he can do so without grave inconvenience.[102]

It frequently happens that after testimony has been heard and the evidence gathered and studied, the settlement of the case remains doubtful. The doubt may be either a doubt of fact, *dubium facti*, a doubt whether the deed as charged has really been committed, or a doubt of law, *dubium juris*, a doubt about the existence of the law, or whether or not its interpretation covers the specific case. In cases of inconclusive evidence and doubtful decisions, what course of action is the judge to follow?

In doubtful criminal cases, the judge may not condemn

[100] Cf. P. Joanne B. Ferreres, S. J., *Compend. Theol. Moralis*, (ed. 14, Barcinone: Eugenius Subirand, 1928), II, n. 4, p. 4.

[101] de Lugo, *De justitia*, disp. 37, n. 41; Noldin-Schmitt, *op. cit.*, n. 723, p. 665.

[102] Noldin-Schmitt, *op. cit.*, n. 740, p. 677.

the accused. Here we must keep in mind the "fundamental ethical tenet resolutely defended by Catholic philosophers and theologians, that a person has a right to be held innocent until he is proved with certainty to be guilty."[103] For crimes are not to be presumed but proved, and it is better for the public good if a guilty person is undeservedly absolved than if an innocent person is unjustly condemned.[104]

The certainty required for establishing guilt is not absolute certainty which excludes every possibility of error, and which in most instances of human activity is hardly obtainable, but that moral certainty in human affairs which excludes every prudent and probable doubt to the contrary. The criminal condemned as guilty cannot be only probably guilty, or more probably guilty than not, or very or even most probably guilty, but must be certainly guilty—with that moral certainty which excludes every probable and prudent doubt to the contrary,[105] that is to say, the judge or jury must be convinced of his guilt "beyond a reasonable doubt."[106] It is a very difficult matter to ascertain just when circumstantial evidence becomes sufficiently strong to establish moral certainty of guilt. Yet at times it can be that strong, as for example it was thought to be in the celebrated Lindberg kidnapping case of 1935.[107] The judge must be sure that it makes for moral certainty and not mere probability.

In doubtful civil cases, if one party is in certain possession of the matter of controversy, the judge is held to favor that party according to the principle "melior est conditio possidentis." The party in possession is to be favored until

[103] Connell, *op. cit.*, p. 26.

[104] Merkelbach, *op. cit.*, n. 637c, p. 671.

[105] Pope Pius XII, "Address to the Sacred Roman Rota," October 1, 1942, *AAS*, 34 (Nov. 23, 1942), 340; Bouscaren, *Canon Law Digest Supplement Through 1948*, p. 226.

[106] *Corpus Juris*, Vol. 16, p. 988ff; § 2395ff; Simon Greenleaf, *A Treatise on the Law of Evidence*, (revised and enlarged, and annotated by John Henry Wigmore, Boston: Little, Brown and Co., 1899), I, p. 158.

[107] Cf. 180 At. 809ff.

the contesting party has definitely and certainly proved his right by offering "clear and convincing proof" of his contrary claim,[108] or by establishing a preponderance of evidence set over against the presumptive and accumulated evidence of the defendant.[109] But if neither party has certain possession of the matter of controversy, and there is an unequal probability in the claims advanced, the judge ought to favor the side which had the more probable claim, whereon there is the "preponderance of evidence." Such, in fact, is the practice of the courts.[110]

A proposition which maintained the judge could favor a less probable opinion was condemned by Pope Innocent XI in a decree of the Holy Office in 1679.[111] If their claims are proven equally probable, the judge should try to get the parties to settle between themselves,[112] or apportion equally to both sides,[113] or as some say, if the parties will not agree and the law demands a decision be given for one or the other, the judge is free to select either.[114] In regard to equally probable claims, court procedure in the United States has established the rule that if there is an equilibrium of evidence on an issue of fact, that party loses the verdict upon whom lies the burden of proof.

> Where the evidence on an issue of fact is in equipoise, or there is any doubt on which side the evidence preponderates, the party having the burden of proof fails upon that issue. That is to say, if the evidence touching a disputed fact is equally balanced, or if it does not produce a just, rational belief of its existence, or if it leaves the mind in a

[108] Cf. *Corpus Juris*, Vol. 23, p. 24, § 1759.
[109] Cf. *Corpus Juris*, Vol. 23, p. 11ff, § 1743ff.
[110] *Ibid.*
[111] Denzinger-Bannwart-Umberg, *Enchiridion Symbolorum*, n. 1152.
[112] Merkelbach, *op. cit.*, n. 637c, p. 672.
[113] Gury-Ballerini, *Compendium Theologiae Moralis*, (ed. 9, Ex Typographia Polyglotta, S.C. de Propaganda Fide, Rome, 1887), Tomus II, n. 1, p. 2.
[114] de Lugo, *De justitia et jure*, Disp. 37, n. 114; Gury-Ballerini, *op. cit.*, n. 1, p. 2, note e; Merkelbach, *op. cit., ibid.*

> state of perplexity, the party holding the affirmative as to such fact must fail.[115]

In final decisions in both civil and criminal trials, the nature and measure of the sentence are often left to the discretion of the judge. In suits for damages, the judge sometimes has the power of awarding more or less to the victor. He cannot arbitrarily, as mood directs, choose this or that sum, but after weighing all circumstances and angles of the case, must award such damages as to him seems the just amount for what harm has been done. In criminal cases the law nowadays often fixes a maximum and minimum penalty to be imposed for specific crimes. Likewise here the judge cannot choose haphazardly the one or the other, or somewhere between the two. The judge has been given leeway precisely to be the better able to adapt the punishment to the crime and its circumstances. Accordingly, after due consideration, the judge should give such a penalty as will both safeguard the common good and at the same time look to the repentance and rehabilitation of the guilty party. As Father Connell puts it:

> In the event of conviction, the nature and measure of the sentence often lie within the discretionary power of the judge. This does not mean that he may choose arbitrarily to be lenient or severe, according to the mood of the moment. This disposition of law has been introduced chiefly in order that the judge may be empowered to select a form of sentence best adapted to th eamendment of the culprit. Accordingly, a judge must conscientiously examine all the facts of the case, with a view to this purpose of punishment, before passing sentence. Thus, two extremes can be avoided—the encouragement of crime by excessive leniency toward the unrepentent malefactor, and the crushing of aspirations toward improvement by excessive rigor toward one whose wrongdoing was due mainly to ignorance and unfavorable environments.[116]

[115] *Corpus Juris*, Vol. 23, pp. 11-12, § 1744.
[116] Connell, *op. cit.*, pp. 26-27.

The sentence should be exacted without cruelty and undue rigor. When in doubt about the greater or lesser penalty, the judge should choose the lesser, and his integrity demands no increase of penalty because of anger or hatred. In case the death penalty is given, the sentence ought to be carried out with propriety, in keeping with the sacredness of human life which the guilty person is forfeiting. The condemned person must be given ample time to appeal, to repent of his sins, and to receive the holy Sacraments in preparation for death, unless grave harm is feared from delay.[117] The condemned person is in danger of death and the reception of the Sacraments of Penance and Holy Communion are an obligation commanded by divine law. But if having been given ample opportunity to receive the Sacraments, the condemned is unwilling to do so, no one is held to prolong the time of execution, for then his damnation is his own fault.[118]

What are the obligations of the judge who has inflicted an unjust sentence? If the judge has passed the unjust sentence without blame, through no fault of his own, for example, through mere inadvertance, he is held in justice and in charity to do what he can without relatively grave inconvenience to recall the unjust decision, or if this is impossible, to suggest the case be appealed. Since there is no moral guilt, the judge is not held in commutative justice to make restitution for whatever irreparable harm may have been done. However, should he neglect to take the necessary steps to correct his error and to prevent harm flowing from it, when he could do so without grave inconvenience, he is held responsible and must repair whatever damage he causes by his negligence.[119] If grave harm has resulted, his obligation to restore is likewise a grave one, binding under pain of mortal sin.

[117] Aertnеys-Damen, *op. cit.*, n. 1231, 5.
[118] *Ibid.*
[119] Merkelbach, *op. cit.*, n. 638, p. 672; also n. 296a, p. 297.

If the judge is to blame for the unjust sentence, he is held with proportionate grave inconvenience to himself to recall it. If recalling it is impossible, he must direct the injured party to appeal to a higher court, and has the obligation to make up for whatever damage has been caused. The judge sins mortally against legal justice, since he fails properly to fulfill his office. He sins also against commutative justice because of the injury done to the loser in the trial. This sin is measured by the gravity of the harm done and is usually mortal. If mortal, his obligation to restitution will bind under the same penalty.

Should the judge have been guilty of not imposing a fine when he should have done so, he sins against legal justice. But he is not bound to restore to anyone, since the purpose of the fine is not to enrich the treasury and the state has no strict right to it until it has been imposed by the judge.[120]

In presiding over his court the judge should insist that a becoming and decorous order befitting a hall of justice reign within his courtroom. He should be particularly attentive to see that his court clerk in administering the oath to witnesses does not just rattle it off in singsong fashion, or hurriedly as though it were mere routine and of little meaning. The oath is a solemn calling on Almighty God to witness the truth of what is to be spoken in evidence. The judge should see to it that witnesses understand the gravity of the oath they take and that the clerk administers it in a becoming manner befitting a solemn act of religion.

[120] *Ibid.*, n. 638, p. 672.

CHAPTER IV

THE CATHOLIC JUDGE AND UNJUST LAWS

We now come to the consideration of the important problem of the Catholic judge and unjust laws. In his allocution to the Italian jurists, His Holiness, Pope Pius XII said: "We well know, dear sons, how not infrequently in the soul of the Catholic jurist who wishes to remain faithful to his Christian concepts of law, there arise conflicts of conscience, especially when he must apply a law which conscience itself condemns as unjust."[1]

The problem of today's unjust law, a source of deep anxiety in professional life, has its basis in the insoluble contrasts existing between the Christian concept of man and law and that of juridical positivism. Since the end of the eighteenth century, says the Holy Father, this problem has become more troublesome, and Catholic judges have found themselves faced with an increasing number of cases calling for the application of unjust laws.

What is the Catholic judge to do in these circumstances? In order to enlighten the minds of judges, to give them guidance, to recall to them their obligations, the Holy Father takes the opportunity to state four fundamental norms for the handling of such cases. In this chapter we shall discuss these four norms. But before entering upon a discussion of them, we shall first clarify what we mean by a just and unjust law.

We must bear in mind when speaking of unjust laws that we do not and cannot speak of the eternal law, the divine positive law or the natural law as being unjust. These laws simply cannot be unjust, for they have their being and ex-

[1] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," Nov. 6, 1949, *AAS*, 41 (Dec. 22, 1949), 602; *The Catholic Mind*, 48 (Jan 1950), 57.

istence from God himself, who is the source of all justice—who is Justice Itself.

Can there be an unjust ecclesiastical law? The prerogative of infallibility in matters of faith and morals when speaking officially for the whole body of faithful which Christ bestowed upon his Church protects the Church from passing universal laws which in principle would be immoral. This infallibility, however, is not said to extend to the opportuneness or administration of changing disciplinary laws. Moreover, it is possible, apart from the principle involved in a universal law, that an occasional unjust ecclesiastical law might make its appearance. There is a certain humanness in the purely ecclesiastical legislation of the Church, and in a particular instance a local ecclesiastical authority might enact and enforce a bit of legislation which exceeds his authority and jurisdiction or might infringe on the personal rights of his subjects. An unjust ecclesiastical law, however, is a rarity, and it is not of them that we speak here, since we are concerned with the obligations of civil judges. We speak here only of unjust laws enacted by human civil authority.

A. Just Laws

In answer to the question whether human law binds in conscience, St. Thomas very well describes for us what is meant by the just and unjust law.

> Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience from the eternal law whence they are derived . . . Now laws are said to be just, both from the end (when, namely, they are ordained to the common good), from their author, (that is to say, when the law that is made does not exceed the power of the lawgiver), and from their form (when, namely, burdens are laid on the subjects according to an equality of proportion and with a view to the common good) . . .[2]

[2] *Summa Theologica*, I-II, q. 96, a. 4.

A just law receives its rightness or justice from its end or purpose, its author, and its form. It is just from its purpose if it is ordained to effect the common good of all the citizens; from its author, if it is enacted by or proceeds from rightful authority, which exceeds neither its power nor jurisdiction; from its form, if it equally proportions burdens for the common good of all.

Just human laws are binding in conscience, for they are derived from the eternal law of God. God has created man with a social nature which demands societal living for a full development of human personality. Since governments and laws are needed to order man rightly in society, just laws ultimately have their being, existence and authority from God. Hence citizens are bound in conscience to observe whatever just laws are enacted, with the exception, however, of purely penal laws, which bind in conscience only for accepting and undergoing a just penalty if it be imposed in case of violation.[3]

In another place, St. Thomas defines law as an "ordinance of reason for the common good, promulgated by him who has the care of the community."[4] A civil law is called just and good if it fulfills all the requirements of this definition. It must, therefore, be reasonable, that is, proceeding from man's reason and directing man according to truth to his proper end. It must be for the common good of the community both in purpose and content. It must be enacted and made known by proper governmental authority rightly using its powers and jurisdiction. A law fulfilling these requirements is a good and just law.

In his allocution to the jurists, Pope Pius XII analyzes the idea of the just law. While the most general object of the juridical science is human and divine things, its most specific object, the Holy Father says, is the just and the unjust,

[3] Merkelbach, *Summa Theologiae Moralis*, I, n. 287; Thomas Slater, *A Manual of Moral Theology* (New York: Benziger Bros., 1908), I, pp. 127-28.

[4] St. Thomas Aquinas, *Summa Theologica*, I-II, q. 90, a. 4.

or justice—insofar as this noble virtue has the function of regulating the balance of individual and social needs. Justice is the virtue which demands that each receive what is his due.[5] In a kind of panoramic vision justice views the entire human and civil order established by the perfect mind of God. It recognizes all the rights and duties inherent in each individual man, in society as a whole, and in society's institutions. And as a virtue it dictates and imposes universal norms of conduct together with many practical principles for the realization of these rights and duties. To perfect these rights and duties justice lays down rules or laws. Law, then, becomes a practical norm or rule in which the great and fruitful idea of justice is expressed, becomes concrete and real in human society. Law, says the Holy Father, in quoting St. Thomas, is the object of justice.[6] Law, therefore, is nothing more than a legislated expression of justice, a concrete and practical direction or ordering which sees to it that each receives what is due to him in social living. According to the Holy Father, then, the just law is that which is in conformity with the fundamental rights and duties of individuals and institutions in society, and so directs and orders that each receives his due. This is what the Holy Father means when he says:

> . . . the most specific object of juridical science is the just and unjust (*justi atque injusti scientia*), or justice, in its high function of regulating the balance of individual and social needs in the bosom of the human family . . . It (justice) is above all something inherent in man, in society, in its fundamental institutions, because of that sum total of practical principles which it dictates and imposes, of those more universal norms of conduct which form part of the objective human and civil order established by the perfect mind of the First Maker . . . Law, as Aquinas taught, (*est objectum justitiae*) is the object of justice. It is the norm in which the great and fruitful idea of justice becomes concrete and real and as such leads to God, eternal and

[5] *Ibid.*, II-II, q. 58, a. 1.
[6] *Ibid.*, II-II, q. 57, a. 1.

> immutable Justice in its essence: from God it receives light and clearness, vigor and strength, meaning and content.[7]

The just civil law, therefore, is that which works justice, which gives to each what is his due in relation to the good of all. The just civil law must take into consideration and conform to both the true nature of man and the true nature of law. Regarding the nature of man it must see him as a dependent creature of God, made like unto the Divine image, possessed of certain definite God-given rights and duties, made to live for a time upon the earth with others in society, but destined to another and this next a supernatural, everlasting life with God in heaven, the attainment of which is set before him as his final goal and purpose, and toward which he is to bend every effort and direct every action.

Civil law, if it is to be just, must likewise recognize its own true nature, understanding that it has its being, existence, foundation and authority from God who has so made man that civil laws are necessary. It must understand that it has the noble task of ordering things properly in society so that man's God-given rights, such as the right to life, personal liberty and security, good name and marriage, may be protected and realized and his final goal attained. Civil law must know that neither itself nor the state gives these rights to man. They exist prior to the state, prior to the civil law; they are God-created rights and God-bestowed. Civil law guarantees man's God-given rights, protects them when threatened and restores them when they have been overthrown by tyrannical power.

In understanding its true nature the just civil law will also recognize its limitations. It is not all-powerful. God has enacted other laws superior to it, upon which it must not infringe nor transgress, and to which it must conform. God's eternal law, from which it derives its being, envelops it. The natural law which God has implanted in man's na-

[7] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," Nov. 6, 1949, *AAS*, 41 (Dec. 22, 1949), 601; *The Catholic Mind*, 48 (Jan. 1950), 56.

ture civil law cannot change, exceed or deny. God himself has enacted his divine positive laws. Civil law cannot oppose them. God has given his one true Church authority in spiritual matters. That field is not within the civil law's jurisdiction. It must not invade the Church's God-given rights. Nevertheless, the position of the just civil law is a noble one. It has a part in directing man's temporal welfare and as such helps him to gain his eternal reward. The civil law will be a just law if it limits itself to its own nature and purpose and to the nature and purpose of man whom it directs and orders in society.

B. Unjust Laws

Set over against the just law we have the unjust law. Speaking of this type of law, St. Thomas says:

> On the other hand, laws may be unjust in two ways: first, by being contrary to human good, through being opposed to the things mentioned above:—either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity and vainglory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. Such are acts of violence rather than law, because, as Augustine says "a law that is not just seems to be no law at all."[8] Therefore, such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right . . . Secondly, laws may be unjust through being opposed to the divine good. Such are the laws of tyrants inducing to idolatry, or to anything else contrary to the divine law. Laws of this kind must in no way be observed, because, as is stated in the Acts v. 29, "we ought to obey God rather than men."[9]

[8] *De libero arbitrio*, I, 5 (PL 32, 1227).
[9] *Summa Theologica*, I-II, q. 96, a. 4.

One can understand what is meant by an unjust law when he sees its opposition to the just law. According to St. Thomas Aquinas a civil law is unjust in two ways, by being opposed to a human good or to a divine good. It is contrary to a human good if it is opposed to the end or purpose of the law, the common good, if it exceeds the power or jurisdiction of the author, or if in respect to form it imposes proportionally unequal burdens on the people. Should a law offend in being opposed to a human good in any of these three ways, it does not satisfy the requirements of a true law and is unjust. The lawgiver does not have the power to legislate injustices. Such a law in reality is no law at all, and of itself does not bind in conscience. A law of this kind, however, oftentimes has the form or appearance of law, having been enacted and promulgated according to due legislative procedure, and seemingly being directed to the common good, and perhaps upheld by court decisions. Although it does not of itself bind in conscience, this kind of unjust law opposed to a human good must at times be observed in order to avoid scandal and confusion in society, as for example, when in a given instance more harm than good will be done by not complying with a not too evident unjust tax law.[10]

That law is also unjust which is opposed to divine good. Simple logic concludes that a creature may not oppose or set aside laws and rights established by God himself. Human beings may never arrogate to themselves powers superior to divinity. A civil law which is in opposition to the divine positive moral law, made known and promulgated through Revelation, or to the natural law God himself has implanted in the nature of man, or which is in opposition to the divinely given rights and duties of the one true Church, is indeed an unjust law. Human ideas and laws cannot set aside what God has established, and the law that attempts to do so is out of order, totally lacking in the quality of justice, and hence invalid. Such a law can never bind in conscience and

[10] *Ibid.*, I-II, q. 96, a. 4, ad 3.

should not be obeyed.[11] "We ought to obey God rather than men."[12]

Whereas the just law is a practical concrete expression of what is just in social living, in contrast the unjust law is a violation of justice, commanding actions which cannot be squared with the norms regulating civil law. The unjust civil law is a proud creature. It makes a declaration of independence from superior laws and sets itself up as the superior, and sometimes as supreme in the entire field of law. An unjust civil law is one that violates its own purpose in its own field, or that wanders from its limited field and commands or forbids actions which are opposed to divine law, either positive or natural. The lawgiver who enacts it has a false concept of law or a false concept of human nature.

1. American Jurisprudence and Unjust Laws

We are living in an age that is well acquainted with unjust laws. We have about us legal philosophies which hold and daily teach false concepts of law, concepts not meant to remain sterile, since thought directs to action. The effect has been some unjust laws in our own land, for example, eugenic sterilization laws and divorce laws of the different states, and an abundant harvest of them in foreign countries.

In addition to scholastic jurisprudence, which is the correct jurisprudence and which is taught in Catholic colleges and universities, there are in the United States other prominent schools of juristic thought. They are the schools of sociological jurisprudence, economic determinism, realism, and the analytical school.[13] These hold to and teach false concepts of law.

a. Sociological Jurisprudence

Sociological jurisprudence maintains the legal order is altogether shaped by the social order. It proceeds with the

[11] *Ibid.*, I-II, q. 96, a. 4, ad 2.
[12] *Acts of the Apostles* 5, 29.
[13] Lebuffe and Hayes, *The American Philosophy of Law*, pp. 149-62.

fundamental tenet that we cannot understand what a thing is unless we understand what it does. So we cannot understand law unless we understand what law does. An analysis of the judicial process sheds light on the function of law. In the judicial process, when no set way is indicated, the judge does not come up with a ready made answer from an abstract objective legal order of norms but he considers the comparative importance of the many conflicting social customs, wants and interests and by his decision balances them, securing the satisfaction of the maximum of wants with a minimum of friction. In this what does law do? Plainly it satisfies the wants of the people. What therefore is law? Law is a rule or instrument for satisfying the customs, wants and interests of the people.[14] This view of law is that of Roscoe Pound, who is called the leader of sociological jurisprudence.[15] Thus does Pound speak in one of his writings:

> For the purposes of the science of law we may say that an interest is a claim, a want, a demand, of a human being or group of human beings which the human being or group of human beings seeks to satisfy and of which social engineering in civilized society must therefore take account. So defined, the interests which the legal order secures may be claims or wants or demands of individual human beings immediately as such (individual interests) of the political organization of a society as such, conceived as a person (public interests) or of the whole social group as such (social interests) . . .[16]

A survey of the social order discovers the following general interests of which the law has taken account: first, the social interest in the general security; second, the social interest in the security of social institutions; third, the social interest in the general morals; fourth, the social interest in the conservation of social resources; fifth, social

[14] Lebuffe and Hayes, *Ibid.*, p. 150.

[15] G. W. Paton, *A Text-Book of Jurisprudence*, (Oxford: Clarendon Press, 1946), p. 18.

[16] Roscoe Pound, "A Theory of Social Interests," *Papers and Proceedings of the American Sociological Society*, (Chicago: Univ. of Chicago Press, May, 1921) Vol. 15, pp. 29-30.

interest in general progress; and last, social interest in the individual life.[17]

> Such in outline are the social interests which are recognized or are coming to be recognized by modern law. Looked at functionally, the law is an attempt to reconcile, to harmonize, to compromise these overlapping or conflicting interests, either through securing them directly or immediately, or through securing certain individual interests or delimitations or compromises of individual interests, so as to give effect to the greatest number of interests or to the interests that weigh most in our civilization, with the least sacrifice of other interests.[18]

And again:

> The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.[19]

Benjamin Cardozo, late justice of the Supreme Court, was a member of the sociological school. He wrote:

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will thereby be promoted or impaired.[20]

[17] *Ibid.* pp. 33-41.

[18] *Ibid.*, p. 44.

[19] Pound, "Mechanical Jurisprudence," 8 *Columbia Law Review*, 609-10; Cf. also Pound, "The Scope and Purpose of Sociological Jurisprudence," 24 *Harvard Law Review*, 596-619 and 25 *Harvard Law Review*, 140-68.

[20] Benjamin Cardozo, *The Nature of the Judicial Process*, (New Haven: Yale University Press, 1921), p. 112.

What then is the norm of the sociological jurisprudence? It can easily be seen that the goodness or badness, the rightness or wrongness, the justice or injustice of a specific law is measured by its compliance with the customs, wants and interests of the people. For sociological jurisprudence, there is the norm—the social consciousness of the people expressing itself in their customs, wants, interests, demands and aspirations. Indeed this is no fixed measure, but a very relative one. As the customs, wants, interests, demands and aspirations of the people change, so changes the norm or measure of the justice of the law. The just law then, according to this view, is the law that complies with the interests of the people at a particular time; the unjust law, that which does not comply. Really in this view law does not purport to serve justice at all. In the final analysis there seems to be no concept of justice.

This view of law is not a true one. In fact, it denies the existence of an objective truth and morality. There is no objective measure to which human laws are related for their rightness. All is relative. Rightness becomes only a changeable, subjective thing, awaiting a new rightness when a new interest or desire of the people shall so indicate. What is right or wrong today may become the exact opposite tomorrow if the sociological aspirations of the people so express themselves. Logically one can say that whereas mercy killing is wrong today because it is against the customs and desires of the people, it will be right tomorrow should the people want it so and change the law, as if there is no other basis or norm of morality than the "legal right" or the legislated or judicially recognized expression of a social want. To cross the border of another country in hostile attack without provocation and without reason is an unjust war of agression today and for us is wrong. But it can be right tomorrow if the nation should want it so. In this view inherent rights have an uncertain existence.

It is true that customs, interests, wants, demands and aspirations of the people have an important part to play

in the enactment of human civil laws, that laws must be brought up to date to fit time, place and circumstance, and that hence human laws are changeable. But this mutability is an accidental one and does not reach down to the laws based on the fundamental rights implanted in man's nature by God himself. These latter rights, for example, the right to life, liberty, bodily integrity, the right to marry, to hold property, natural to man and divinely given, do not change, and although at times certain restrictions may be placed upon them by legitimate authority, new human legislation cannot set them aside at the will of society. Sociological jurisprudence is based on an unreliable relativism. It does not admit an objective order of truth. In theory at least, and in practice too, it makes room for the wildest sort of laws resulting from the wildest sort of social interests. Anything could be right if the people so desired. In this it is wrong. Speaking of Dean Pound's sociological jurisprudence, Paton says:

> Pound's view is essentially relativistic, for he emphasizes that the jurist as such has no divine charter to determine the ends which law should pursue, but can only tentatively effect compromises valid for his time and generation because they are based not on absolute ideal but on the views held by that particular community at the moment.[21]

b. Economic Determinism

In the writings of Brooks Adams we have an accurate description of the juristic thought called economic determinism. Similar to sociological jurisprudence, economic determinism finds the legal order shaped by the existing social order. But whereas the former says the law is shaped by customs, interests, wants and demands of the people, the latter says it is the product of the dominating economic group. Adams writes as follows:

> The law, if we view it right, presents a series of phenomena, evolved by the conflict of social forces;

[21] Paton, *op. cit.*, p. 19.

> and if we would understand those phenomena, we must begin by understanding the society which caused them.... The law is the envelope with which any society surrounds itself for its own protection. The rules of the law are established by the self-interests of the dominant class, so far as it can impose its will upon those who are weaker... The dominant class, whether it be priests or usurers or soldiers or bankers, will shape the law to favor themselves, and that code will most nearly approach the ideal of justice of each particular age which favors most perfectly the dominant class.... It follows that the law is an example of Darwin's generalization of natural selection. Those fittest to survive in each particular environment prosper, those unfit suffer in proportion to their unfitness.[22]

This theory held also by Charles A. Beard,[23] Francis H. Bohlen[24] and others is an application of the Marxian theory to the legal order. Law is only a tool of class privilege, an instrument of the ruling power, a means of class domination and class oppression.[25] The true law, the just law, according to it, is the one which assists the dominant group in the exercise and retention of its dominating power. Here too in

[22] Brooks Adams, *Centralization and the Law*, (Boston: Little, Brown & Co., 1906), pp. 45, 46, 63, 64.

[23] Cf. Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, (New York: The MacMillan Co., 1935), where he says: "Sadly as the economic factors have been ignored in historical studies, the neglect has been all the more pronounced in the field of private and public law (p. 8).... The social structure by which one type of legislation is secured and another prevented—that is, the constitution—is a secondary or derivitive feature arising from the nature of the economic groups seeking positive action and negative restraint (p. 13).... The point is, that the direct, impelling motive in both cases was the economic advantages which the beneficiaries expected would accrue to themselves first, from their action. Further than this, economic interpretation cannot go. It may be that some larger world-process is working through each series of historical events; but ultimate causes lie beyond our horizon (p. 18)."

[24] Cf. Francis H. Bohlen, *Studies in the Laws of Torts*, (Indianapolis: Bobbs, Merrill Co., 1926), pp. 367-77.

[25] Lebuffe and Hayes, *op. cit.*, p. 154.

this theory, we have the absence of an objective norm to measure the rightness of the law. The oppressing power can make any law it wills without restriction, and the naturally inherent rights of the oppressed are no hindrance. Here we have rampant an evil relativism which left to itself leads to terrible consequences, as it has, for example, in the communistic dominated lands of the world.

c. Realism

The realist school of juristic thought begins with skepticism. It calls into question the traditional acceptance of universal norms. It denies the existence or value of such universal norms and maintains that a true knowledge of law and its purpose is obtained, not by a rational but by a psychological and experimental analysis of the law's operation in society. In this analysis law is seen to be not a set of legal rules telling what ought to be done, but is what the courts do in fact. The real behavior of the judges and officials of the law constitutes the law. In this theory the judge or official in arriving at his decision is affected by a series of psychological reactions to stimuli, so that the individual characteristics of the judge or official, his own prejudice or pleasure, his own disposition or indisposition, and the varied and complex stimuli of courtrooms have more to do with a final judgment than statutes or constitutions.[26]

The basic error of this theory of realism as with the other theories is its relativism, its denial of any absolute normative factor in jurisprudence. One sees that the law is what the judge or official actually declares, and what the judge or official declares can here indeed be only a very relative affair, having no basic in an objective order of reality. For realists a higher regulative norm does not exist and the behavior of the people and especially of the officials becomes the law. Given control of the formation of law, realists would quickly discard, as their theory indicates, what regulative norms we have, and law itself is on the way to destruction.

It is not out of place to mention here the juristic thought

[26] Paton, *op. cit.*, pp. 19-22.

of the late Justice Oliver Wendell Holmes, Jr., who is considered the forerunner and the inspiration of the present day American realist. Mr. Justice Holmes has had a large influence upon the legal thought of our land, if we can believe the statements authoritative persons have made of him.

Roscoe Pound says Holmes "has done more than lead American juristic thought of the present generation. Above all he has shaped the methods and ideas that are characteristic of the present as distinguished from the immediate past." And the late Justice Benjamin Cardozo has this to say of him: "He is today for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages."[28] Present Justice Felix Frankfurter says of him: "He, above all others, has given the directions to contemporary jurisprudence. He wields such a powerful influence upon today, because his deep knowledge of yesterday enables him to extricate the present from meaningless entanglements with the past and yet to see events in the perspective of history."[29] Justice Frankfurter speaks of him as "philosopher become king"[30] and has said that romantic legends will doubtless gather round his name and that for centuries men to whom he will be among the great and men who never heard of him will move to the measure of his thought.[31]

If Justice Holmes is "one of democracy's noblemen,"[32]

[27] Pound, "Judge Holmes's Contribution to the Science of Law," 34 *Harvard Law Review*, (March 1921), 449.
1931), 684.

[28] Cardozo, "Mr. Justice Holmes," 44 *Harvard Law Review*, (March 1931), 684.

[29] Felix Frankfurter, "The Early Writings of O. W. Holmes, Jr.," 44 *Harvard Law Review* (March 1931), 723.

[30] Frankfurter, "Twenty Years of Mr. Justice Holmes' Constitutional Opinions," 36 *Harvard Law Review* (June 1923) 919.

[31] Frankfurter, "Mr. Justice Holmes," 48 *Harvard Law Review* (June 1935) 1280.

[32] Johnson, *Government in the United States*, p. 893.

one who has contributed most to juristic thought in the United States, and one who supposedly is exercising today and will exercise in years to come the greatest influence on legal philosophy, it behooves us to know to what sort of influence we are to be subjected, to know what is this man's idea of the nature of law and man. An inquiry is rather startling and reveals the rankest kind of concept of the nature of law and of man, a concept of the purely totalitarian sort that sends shivers up one's spine when he realizes the extent to which it could be carried.[33] Regarding the natural law, Holmes says:

> The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.[34]

Having discarded the natural law, he tells us that the law is the prophecy of what the courts will do in fact.

> Take the fundamental question, what constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by the law.[35]

[33] *Cf.*, Ben W. Palmer, "Hobbs, Holmes and Hitler," 31 *American Bar Association Journal*, 569-73; "Defense Against Leviathan," 32 *American Bar Association Journal*, 328ff; "Reply to Mr. Charles W. Briggs," 32, *American Bar Association Journal*, pp. 635ff; "Totalitarianism of Mr. Justice Holmes," 37 *American Bar Association Journal*, 809-11.

[34] O. W. Holmes, "Natural Law," 32 *Harvard Law Review*, 41.

[35] Holmes, "The Path of the Law," 10 *Harvard Law Review*, 460-61.

And what the courts do in fact is to bring to bear public force upon men who must be constrained to live as others are living. All law is tied up with physical force. In truth, law is merely "a statement of the circumstances in which the public force will be brought to bear upon men through the courts,"[36] and the object of the study of law is the "prediction of the incidence of the public force through the instrumentality of the courts."[37]

Of man and his nature, he wrote:

> It seems to me probable that the only cosmic significance of man is that he is part of the cosmos but that seems to me enough.[38] I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or a grain of sand.[39] But I do think that man at present is predatory animal. I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction.[40]

There is neither room nor need here, however, for a complete analysis of Holmes' thought. The Rev. John C. Ford, S.J., has given us a summary of the thought to whose measure Mr. Justice Frankfurter maintains our age and future ages are to march.

> And let me summarize again the thought to whose measure we are going to move: The essence of law is physical force. Might makes legal right. The law is to be divorced from all morality. There is no such thing as a moral *ought*—it is a mere fiction. Ultimately there is only the physical necessity of behaving or being killed. There is no absolute truth. Man is a cosmic ganglion. His ideas probably have no more cosmic significance than a baboon or a grain of sand. There is too much fuss about the

[36] Holmes, *Justice Oliver Wendell Holmes, His Book Notices and Uncollected Letters and Papers*, ed. by Harry C. Shriver (New York: Central Book Co., 1936), p. 157.

[37] Holmes, "The Path of the Law," 10 *Harvard Law Review*, 461.

[38] Holmes, *Holmes-Pollock Letters*, ed. by Mark De Wolfe Howe, (Cambridge, Mass: Harv. University Press, 1941), II, p. 13.

[39] *Ibid.*, p. 252.

[40] Holmes, *Holmes-Pollock Letters*, II, p. 36.

> sanctity of human life. To the state man is a means to be sacrificed if necessary in the interest of the state. The ultimate arbiter of all life is physical force. The ultimate *ratio decidendi* when men disagree is this, Holmes' words: "We don't like it and shall kill you if we can."[41]

It should be pointed out, as Father Ford does in his article, that in general Justice Holmes in public life and as a judge did not put into effect the above doctrine,[42] although evidences of it were manifested.[43] But it is this thought, and herein we must be concerned, that was present in the Supreme Court of the United States for thirty years.

Ideas are instruments of power. Holmes knew himself that thought somehow finds its way over into action when he said: "To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas."[44] The ideas he has sown in his writings, given proper circumstance and handling, can lead to the greatest degradation. And they are ideas that receive the plaudits of many thinkers in modern law. This is indeed a cause for concern and Catholic jurists should do mightily in the expose of such false concepts.

Writing in *Newsweek* Raymond Moley has this to say about attacks upon the natural law and Holmes' influence upon American jurisprudence:

> The earlier enemies of the concept of natural law were the "positivists." They held that there were only positive or man-made law and that the laws made by the state or government were the only directors of conduct binding upon men living in so-

[41] John C. Ford, S.J., "The Fundamentals of Holmes' Juristic Philosophy," Lebuffe and Hayes' *The American Philosophy of Law*, p. 403.

[42] *Ibid.* pp. 398, 401.

[43] Cf. Hudson County Water Co. v. McCarter, 209 U.S. (April 6, 1908) 355; Buck v. Bell, 274 U.S. (May 2, 1927) 207; also John B. Gest, "Eugenic Sterilization, Justice Holmes vs. Natural Law," 23 *Temple Law Quarterly* (April 1950), 306-12.

[44] O. W. Holmes, *Speeches*, (Boston: Little, Brown & Co., 1913), p. 54.

> ciety . . . Notable leaders of the attack upon natural law in our time have been John Dewey in philosophy and education and Oliver Wendell Holmes in jurisprudence. Despite the wide veneration accorded these two men it is well to note the havoc they have created in the thinking of contemporary America and the perversions of their teaching, for which some of the sorcerers' apprentices have been responsible. Pragmatism, economic determinism, behaviorism, rationalization, and, by a word once applied to the cynicism of Holmes "futilitarianism," have been the spearheads of this attack upon the verities of the past. The result is that we are without certitude, faith, or direction.[45]

d. Analytical School

A fourth school of American juristic thought is the analytical school, said to have as its founder the English jurist, John Austin (1790-1859). It numbers among its followers such well known legal names as Thomas Erskine Holland, William Markby, Sheldon Amos, John Salmond, and in the United States, John Chapman Gray,[46] Wesley Newcomb Hohfeld,[47] and Albert Kocourek.[48]

The analytical school, divorcing law from ethics, maintains that the study of law is based entirely on an analysis of the existing positive legal system, including in its systematic study only such factual rules and materials as existing constitutions, statutes, cases, administrative regulations and other "day-to-day materials of the trade," and admitting nothing as subject matter foreign to that system, admitting nothing higher than the positive law. Thus it is the view of Gray that "the law of the state or of any organized body of men is composed of the rules which the courts, that is, the

[45] Raymond Moley, Article in *Newsweek*, December 25, 1950, p. 68.

[46] Cf. John Chapman Gray, *The Nature and Sources of the Law*, (New York: Columbia University Press, 1909), p. 84.

[47] Cf. William Newcomb Hohfeld, *Fundamental Legal Conceptions*, (New Haven: Yale University Press, 1923), Chapter entitled "A Vital School of Jurisprudence and Law."

[48] Albert Kocourek, *An Introduction to the Science of Law*, (Boston: Little, Brown and Co., 1930), p. 26.

judicial organs of that body, lay down for the determination of legal rights and duties."[49]

In analyzing the analytical school Professor Edgar Bodenheimer gives this appraisal:

> This separation of jurisprudence from ethics, which Austin advocated, is one of the most important characteristics of analytical jurisprudence. According to this attitude, the jurist is merely concerned with the law as it is; the legislator or ethical philosopher alone should be interested in the law as it ought to be. Positive law, in the view of the analytical jurist, has nothing to do with ideal or just law.... It is common to all representatives of the analytical school that they concentrate their investigation upon the positive law of their own time. They consider law, not as a revelation of divine will or a product of superior metaphysical forces governing the fate of man, but exclusively as a product of conscious human action. Law, in their view, is a decree of the supreme social power within a given society. Since in all civilized countries of today this supreme social power is identical with the state, analytical jurists consider law primarily as a command of the state. A legal system is to them a body of rules or norms that are established, recognized, or ultimately enforced by the state. The analytical jurist is not concerned with the historical or sociological processes which exert a determining influence on the formation of the lawmaking will of the holder of power. He looks upon law as a finished product which has been brought about by the exertion of the sovereign will. Whatever the holder of supreme power has decreed to be the law is valid law by virtue of this decree and without regard to its substantive contents.[50]

In line with the above quoted clear and correct appraisal by Professor Bodenheimer, Kocourek maintains that "it is the mission of Analytical Jurisprudence to isolate from the great mass of available legal material the enduring elements

[49] John Chapman Gray, *op. cit.*, p. 84.

[50] Edgar Bodenheimer, *Jurisprudence*, (New York: McGraw-Hill Book Co., Inc., 1940), pp. 276, 279.

which recur endlessly in concrete legal phenomena, and to analyze and arrange these elements into an abstract system of classification."[51] Of course, "available legal material" and "concrete legal phenomena" refer here only to the existing positive legal order. And again Kocourek says: "It must be remembered that Analytical Jurisprudence does not create its premisses: these premisses are furnished by the law itself. It is the function of Analytical Jurisprudence to accept these premisses and to decompose them into their final atomic elements in an organized juristic system."[52] But here too, the "Premisses . . . furnished by the law itself" are from the "great mass of available legal material" and hence admit only of a positive legal order. This is the basic error of the analytical system of thought: it admits of no objective legal order beyond the positive order. In it the only basis for the justice of a law is that analysis find it somehow somewhere in the materials of the existing positive legal system—a system daily subject to change by the supreme will of lawgivers or courts apart from any higher regulative norm.

2. Legal Positivism

The four schools of juristic thought of which we have been speaking sociological jurisprudence, economic determinism, realism, and the analytical school, which hold to erroneous concepts of law, come under the classification of juridical or legal positivism. In final analysis they admit only the positive law as a reality. They study its formation and purpose, the relation of law to law and the succession of laws, and arrive at theories which might be called laws of laws. But they do not arrive at a universal and reject as foolish any mention of an absolute objective norm giving direction and purpose to all civil law.

After speaking of the positivism of August Comte, Professor Bodenheimer in his book on *Jurisprudence* goes on to point out that "Positivism invaded all branches of social

[51] A. Kocourek, *op. cit.*, p. 23.
[52] *Ibid.* p. 26.

sciences, including legal science. In the field of legal theory it assumed various forms, which may be roughly classified as analytical and sociological positivism. Common to both forms of legal positivism is the tendency to eliminate metaphysical and philosophical speculation from legal science and to confine the field of legal research to the empirical world."[53] Sociological positivism differs from analytical in that it studies the factors by which legal rules are brought about, whereas analytical positivism analyzes positive legal rules as such. Yet sociological positivism has this similarity with analytical:

> With analytical positivism it shares a purely empirical attitude toward the law. It looks merely at the positive rules which the law-creating powers in society have produced, scrutinizing them with regard to their sociological origin. It comes within the definition of legal positivism which the Hungarian jurist Julius Moor has given: "Legal positivism is a view according to which law is produced by the ruling power in society in a historical process. In this view law is only that which the ruling power has commanded, and anything which it has commanded is law by virtue of this very circumstance." The fact that sociological positivism is concerned, not with the commands of the ruling power as such, but with the influences which determine the content of these commands, does not deprive it of its positivistic character.[54]

While Professor Bodenheimer does not here mention economic determinism and realism as included in the positivistic jurisprudence yet in reality they must be so included for they too are empirical, non-metaphysical, denying any objective rule of law higher than man-made law. A practical positivism is the judgment that must be passed upon a large part of present day American juristic thought. A false and most unreal approach to the basis of law. As another author says:

> By and large, American lawyers and law teachers

[53] Bodenheimer, *op. cit.*, p. 268.
[54] *Ibid.* pp. 268-9.

> seem to proceed in the spirit of "positivists." They suggest that the analysis of the legal order should not require any "non-legal" materials. Thus, only the cases, the statutes, the regulations of administrative bodies and the other traditional day-to-day materials of the trade are admitted into their subject matter. Beyond these they will not search. For them a Divine Plan, if it exists, need not be consulted. They believe the law can be analyzed and evaluated without requiring reference to such "non-legal" objects or standards.[55]

In considering the just and unjust law, the Holy Father speaks quite lengthily of legal positivism. In the positive philosophy there can be no truly unjust law, for there is no true rule of justice to which the law must answer. For the law is man-made only. It does not have to agree to an objective standard, because there is no objective standard; it sets up the standard; it is the standard. What the law commands, if we may say it, that is justice. It alone grants rights and takes them away. The objective set of human rights so firmly based in the natural law and so clearly taught in Christian thought is all a myth according to the positivistic jurisprudence. So also is a myth the lesson taught us in our cherished Declaration of Independence, where "We hold these truth to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness." The crude system of legal positivism denies what the Declaration of Independence declares; it leads directly to the absolute, the totalitarian state, where unjust laws become the order of the day.[56]

Nor in truth have today's false legal concepts been confined to the classroom or bound volumes only. They have been tried and tested in action. The positivistic concept has been put into action in such recently overthrown systems as

[55] Lebuffe and Hayes, *The American Philosophy of Law*, p. 161-2.
[56] Cf. R. Holiand, S.J., *Natural Law and Legal Practice*, (New York: Benziger Bros., 1889), p. 69.

Nazism in Germany and Fascism in Italy, and in the presently existing communistic territories. These countries give us an example of what can happen when God's law and the natural law are overthrown and the state is set up as supreme. The "legal right" was present in Germany and Italy and is present in communist lands now, maintaining no other foundation for the utterance of a law than the mere announcement of it by the state.

a. In Germany

In Germany we have an example of positivistic sociological jurisprudence going to its extreme. There the wants and interests of the people were bound up in the national conscience of which the state was the expression. In Hitler's "leadership principle," borrowed from historical Hegelianism and foreshadowed in Savigny's contention that law was the determination of the national spirit (Volksgeist),[57] both the national conscience and the state were united in the leader (der Fuehrer), and the leader's will became the expresssion of the interests, aspirations, wants and demands of the German people. Der Fuehrer's will became in this totalitarian way the established law of the land.[58]

When Ernest Röhm and his associates were liquidated without trial or process of any kind in the famous Nazi opposition "blood purge" of June 30, 1934, Adolph Hitler justified the killings as "an act of self-defense of the State." He declared, "In this hour, I was responsible for the fate of the German nation and thereby the supreme Law Lord (Supreme Judge) of the German people."[59] The leader's will is made the law.

In Germany, justice, the rights of citizens, the rights of

[57] Cf. Karl von Savigny, *On the Vocation of Our Age for Legislation and Jurisprudence*, translated by Abraham Hayward, (London: Littlewood, 1831), p. 30.

[58] Edgar Bodenheimer, *op. cit.*, pp. 239ff; Lebuffe and Hayes, *op. cit.*, pp. 131-2.

[59] Karl Lowenstein, "Law in the Third Reich," 45 *Yale Law Journal*, 811.

countries were disregarded. The arbitrary will and cause of the German State was all that mattered. This is shown in Hitler's speech to his military commanders a week before the invasion of Poland in 1939, when he said:

> I shall give a propagandist cause for starting war —never mind whether it be plausible or not. The victor shall not be asked later on whether we told the truth or not. In starting and making a war, not the right is what matters, but victory.[60]

In 1933 the whole Nazi program of oppression of rights and total subjection to the state was forecast by Herman Göring when he publicly announced: "Whoever in the future raises a hand against a representative of the National Socialist Movement or of the state, must know that he will lose his life in a very short while."[61] The German legal system was at the mercy of those in power, and laws aiming at the total subjection of the people were made to fit the need and occasion. Regarding the subjection of the people and the positivism put into action by which it was effected, Justice Robert Jackson, in his closing address at the Nurnberg trials in 1945, remarked:

> New political crimes were created to this end. It was made a treason, punishable with death, to organize or support a political party other than the Nazi Party. Circulating a false or exaggerated statement, or one which would harm the state or even the Party, was made a crime. Laws were enacted of such ambiguity that they could be used to punish almost any innocent act. It was, for example, made a crime to provoke "any act contrary to the public welfare."
>
> The doctrine of punishment by analogy was introduced to enable conviction for acts which no

[60] Adolph Hitler's speech to Commanders in Chief, August 22, 1939, quoted by Justice Robert H. Jackson in his Closing Address, at the Nurnberg Trials. Cf. R. H. Jackson, *The Nurnberg Case*, (New York: Alfred A. Knopf, 1947), p. 145.

[61] Hermann Göring, "Prime Minister Göring's Press Conference," *Volkischer Beobachter*, (Berlin edition, July 23-24, 1933), p. 1, quoted by R. H. Jackson, *The Nurnberg Case*, p. 125.

> statute forbade. Minister of Justice Gurtner explained that National Socialism considered every violation of the goals of life which the community set up for itself to be wrong *per se*, and that the act could be punished even though it was not contrary to existing "formal law . . .
>
> Judges were ousted for political or racial reasons and were spied upon and put under pressure to join the Nazi Party. After the Supreme Court had acquitted three of the four men whom the Nazis accused of setting the Reichstag fire, its jurisdiction over treason cases was transferred to a newly established "People's Court" consisting of two judges and five Party officials. The German film of this "People's Court" in operation, which we showed in this chamber, revealed its presiding judge pouring partisan abuse upon speechless defendants.
>
> Special courts were created to try political crimes, only Party members were appointed judges, and "Judges Letters" instructed the puppet judges as to the "general lines" they must follow. . . . Since the law was what the Nazis said it was, every form of opposition was rooted out, and every dissenting voice throttled.[62]

And again:

> I cannot, of course, deny that these men are surprised that this is the law; they really are surprised that there is any such thing as law. These defendants did not rely on any law at all. Their program ignored and defied all law. . . . International Law, natural law, German law, any law at all was to these men simply a propaganda device to be invoked when it helped and to be ignored when it would condemn what they wanted to do.[63]

What is this but juridical positivism applied? The law of Hitler's regime had nothing to which to conform, no rule or measure to guide it except the ruler's mind or whim as to what was satisfying to his own vainglory or cupidity, or useful to the policy or cause of the state.

[62] Robert H. Jackson, *Ibid.*, pp. 125-6.
[63] *Ibid.*, pp. 81, 82.

b. In Italy

Likewise in Italy the Fascists looked upon law as a means for furthering the cause of the state. The state was all important. All else was subordinate to it. As the fascist philosopher Alfredo Rocco put it:

> For Fascism, society is the end, individuals the means, and its whole life consists in using individuals as instruments for its social ends. The state therefore guards and protects the welfare and development of individuals not for their exclusive interest, but because of the identity of the needs of individuals with those of society as a whole.[64]

So also did the Italian jurist Georgio Del Vecchio teach the supreme power of the state, calling the state the "most perfect organization, the highest power regulating all human activity."[65] While it is true that Del Vecchio believed in the existence of absolute natural law identical with the idea of justice and that the state in extending its power over all forms of human social life should promote the common good, observe the forms of law, give recognition to the value of human personality and impose limits upon itself wherever human personality was placed in jeopardy, yet he admitted in his Hegelian philosophy of the state its power to interfere with individual liberty in the interest of the public good.[66] Bodenheimer comments that it is not without significance

[64] Alfredo Rocco, "The Political Doctrine of Fascism," *International Conciliation*, (October, 1926), No. 223, p. 399; "La Dottrina Politica del Fascismo," (Roma: Sabilimento Typografico Aurora), August 30, 1925, p. 17,—in *Miscellanea Historica*, Vol. 42, No. 19 in Catholic University of America Library, Washington, D.C.—"Per il fascismo la societa e fine e l'individuo e mezzo, e tutta la vita della società consiste nell'assumere l'individuo come strumento dei fini sociali. Anche quando l'individuo e tutelato e favorito nel suo benessere e nel suo sviluppo, cio non avviene mai nell'interesse escusivo del singolo, ma sempre per una convergenza tra l'intresse del singolo e l'interesse sociale."

[65] Georgio Del Vecchio, *Lezioni di Filosafia del Diritto*, German edition, p. 357.

[66] *Ibid.*, pp. 385-6; Bodenheimer, *op. cit.*, pp. 173-4.

that Del Vecchio "has been an active supporter of the Fascist government of Italy."[67]

In its later years Fascism in Italy with the help of the German Gestapo came to the logical application of its theory. The natural law and natural rights were neatly wrapped up into a Fascistic bundle and given a large toss over the bridge into the Tiber, so to speak, and we might presume, with the hope they would be drowned forever. But true human nature is a persistent creation and has a way of reasserting itself. Hence from their beginning both Nazism and Fascism were destined for the fall. Oppression, tyranny and disorder may have their day, but their day is always numbered as the offended sense of human justice eventually finds a way to rise against it. While these systems of government existed, however, they worked untold havoc, indescribable hardship and misery. As proud governmental systems they and their once proud leaders died an ignominious death. But the accounts of their misdeeds and atrocities will live in an infamous history. But let us not forget that the rulers of these governments did everything according to the laws, which they arbitrarily established.

If the only law is that made by the state, if right is established by man-made laws, if the positivistic theory of law is held to be the correct one, then we can raise no complaint against Nazism or Fascism. Therein becomes obvious the folly and crudity of the positivistic concept.

c. In Russia

The positivistic, absolutistic concept was not confined only to the practical jurisprudence of the Nazis in Germany and the Fascists in Italy, now overthrown. It also has a ready advocate in Soviet Russia, which holds to the positivistic economic determinism theory of law, positivistic because it denies objective norms superior to the will of the ruling class. Just as the capitalists have used law to oppress the working classes, so, the Communists say, once they have

[67] Bodenheimer, *op. cit.*, p. 174.

gained power through the revolution, they in turn will use it to put down the capitalists. Since the entrance of the Bolsheviks into power with the revolution of 1917, we have witnessed the enactment of laws putting that view into effect, that have denied and defied God's law and man's natural rights.

Speaking of the soviet concept of law and the role of soviet statutes, Andrei Y. Vyshinsky wrote thus in 1936:

> There can be no discrepancy in soviet law between the law and expediency, because the soviet law is precisely the expression of what is expedient for the construction of socialism and the fight for socialism. Revolutionary or socialist expediency is the actual essence, the real content of soviet legality.[68]

The textbook on soviet constitutional law published in 1938 and edited by Vyshinsky stated the rule of law in the soviet state as follows:

> The dictatorship of the proletariat is a power unrestrained by any laws. But the dictatorship of the proletariat which creates its own laws, uses the laws, demands observance of laws, and punishes violation of laws . . . Marxism teaches that law must be used as a means of struggle for socialism, one of the means of the reconstruction of society on a new basis.[69]

Commenting on the concept of rights in the Soviet, Gsovski says:

> So long as the soviet statesmen and jurists refuse to recognize private rights as natural innate rights of human beings and see in them a grant by the government and (so long as) the soviet law provides rather for their restriction than their free exercise, any attempt at a constructive soviet theory of private law is deprived of sound foundation.[70]

[68] Andrei Y. Vyshinsky, *The Stalin Constitution* (1936), Socialist legality No. 8., quoted in Vladimir Gsovski's *Soviet Civil Law*, (Ann Arbor: University of Michigan Law School, 1948), Vol. I, p. 187.

[69] *Soviet Constitutional Law*, (in Russian 1938), pp. 50, 52, quoted by Gsovski, *op. cit.*, I, p. 212.

[70] Vladimir Gsovski, *op. cit.*, I, p. 212.

Thus it is seen that soviet policy is supreme and becomes the law. Law becomes an effective club wielded in the enforcement of soviet expediency.

This Soviet regime, likewise, has not confined itself within its own nation, but bearing with it a philosophy that calls for a final world domination, it has extended itself from nation to nation, subjugating peoples as it went, until more than eight hundred million people[71] are presently within its power, ruled by a "legal right" or "law" that establishes the dictatorship of the proletariat and makes the will of the state supreme. The mass murders, the mock trials, the forced confessions, the making of agreements and the breaking of them when convenience suits, the slave labor, the disruption and deportation of families, the persecution of the Church, the attack on the very idea of God, the mysterious deaths and disappearances of opposition, the diabolical use of malicious and false propaganda—a litany which could be lengthened—all of this and more, of which we read so much as taking place daily within Soviet controlled nations, are indications of what the legal right with its unjust law can do when pursued to its extreme.

In 1937, the then reigning Pontiff, His Holiness, Pope Pius XI, had this to say of Communism:

> This modern revolution, it may be said, has actually broken out and threatens everywhere, and it exceeds in amplitude and violence anything yet experienced in the preceeding persecution of the Church. Entire peoples find themselves in danger of falling back into a barbarism worse than that which oppressed the greater part of the world at the coming of the Redeemer.
>
> This all too imminent danger . . . is Bolshevistic and Atheistic Communism which aims at upsetting the social order and at undermining the very foundation of Christian civilization.[72]

[71] *The Register*, February 19, 1950, p. 1.

[72] Pope Pius XI, *Atheistic Communism, Five Great Encyclicals*, (New York: The Paulist Press), p. 177.

Pope Pius XI wrote that in 1937. The last sixteen years have proved how true were his words of warning. Communism has spread, expanded and consolidated its strength, and continues to threaten mightily almost everywhere. Soviet Russia does not cease to cast covetous eyes in all directions for new nations in which to effect its doctrines. There are within our own land a large number of persons who believe in its teachings and who hold to its positivistic concept of law. The unjust law has had its part in effecting the precarious world situation of the present moment. Our present situation did not just happen: it flows logically from an erroneous concept of the nature of man and of law. Those who hold even to a milder form of legal positivism should beware of the harm that lies latent in this judicial system.

Speaking of the totalitarian governments of our time and their use of the "legal right or law," Pius XII asks the question:

> Is it indeed necessary to go far back into history to find the so-called "legal right or law" which robs man of all personal dignity and denies to him the fundamental right to life and integrity of his limbs, placing both at the discretion of the party and the state—which in turn does not recognize the individual's right to honor and good name, which disputes parents' right over their children and their responsibility for their education, which above all considers the recognition of God as the Supreme Lord and of man's dependence on Him as without interest for the state and the human community? This "legal right," in the sense just illustrated, has upset the order established by the Creator, calling disorder order, tyranny authority, slavery liberty and crime patriotic virtue.[73]

And again, he says:

> Remove from law the foundation made up of divine, natural and positive law and therefore immutable, and nothing remains on which to base it but the law

[73] Pope Pius XII, "Address to the Sacred Roman Rota," *AAS*, 41 (Dec. 22, 1949), 606.

> of the state as the supreme norm. There we have the beginning of the absolute state. Likewise, this absolute state will necessarily make law itself serve its own proper ends. Juridical positivism and state absolutism have changed and disfigured the noble countenance of justice . . .[74]

C. The Just and Unjust Law—A Recurring Problem

The problem of the just and unjust law is not a new problem. In juridical science as well as in juridical practice it has continually returned to the foreground, cropping up all along in the history of human society. It has been prominent in the thought even of the classical pagans. The Holy Father says that "None of them have given it a profounder expression than Sophocles in his tragedy *Antigone*."[75] Sophocles in this play clearly defines the conflict of the just and unjust law when he has his heroine say that the just man is he who is pious, honest, upright and humane, who fulfills his duties toward God and men, and that Creon has been just and noble in providing proper burial rites for Eteocles. But Antigone also points out that Creon has acted the role of a violent man, using the law of might and tyrannic power when he enacted the false and unjust law denying the same proper burial to Polynices, her brother slain because convicted of treason. Antigone defied the King's orders and buried her brother anyway, for which disobedience she herself was to be buried alive. She preferred to obey the just laws of the gods than the unjust laws of men. In the following scene she explains her disobedience.

> King Creon: And thou did'st dare to disobey these laws?
> Antigone: Yes, for it was not Zeus who gave them forth
> Nor Justice, dwelling with the Gods below,
> Who traced these laws for all the souls of men:
> Nor did I deem thy edicts strong enough,
> That thou, a mortal man, should'st overpass
> The unwritten laws of God that know not change.

[74] *Ibid.*
[75] *Ibid.*

but live forever, nor can man assign when first they sprang to being.
Not through fear of man's resolve was I prepared
Before the Gods to bear: the penalty of sinning against these.[76]

Plato, in his work *Minos* gives a lengthy discourse between Socrates and his companion, in which is shown a keen awareness of the just and unjust law.

Socrates. Hence we must regard law as something noble, and seek after it as a good.
Companion. Undeniably.
Socrates. And we said that law is a city's resolution.
Companion. So we did.
Socrates. Well now, are not some resolutions good, and others evil?
Companion. Yes, to be sure.
Socrates. And, you know, law was not evil.
Companion. No, indeed.
Socrates. So it is not right to reply, in that simple fashion, that law is a city's resolution.
Companion. I agree that it is not.
Socrates. An evil resolution, you see, cannot properly be a law.
Companion. No, to be sure.[77]

The existence of "some resolutions good, and others evil" implies a prior standard of good demanding conformity of civil laws.

Aristotle points out that all men recognize the justice or injustice of particular laws accordingly as they conform to general laws based upon nature.

> Let us now classify just and unjust actions generally, starting from what follows. Justice and injustice have been defined in reference to laws and persons in two ways. Now there are two kinds of laws, particular and general. By particular laws I mean those established by each people in reference to themselves, which again are divided into written

[76] Sophocles, *Antigone*, Lines 450-460.
[77] Plato, *Minos*, 313A-317 A and B.

> and unwritten: by general laws I means those based upon nature. In fact, there is a general idea of just and unjust in accordance with nature, as all men in a manner divine [i.e. discern] even if there is neither communication nor agreement between them. This is what Antigone and Sophocles evidently means, when she declares that it is just, though forbidden, to bury Polynices, as being naturally just.[78]

So also does Cicero give expression to the idea that there is an existent valid objective order in the world, and that laws will be just or unjust according as they agree with that definite order when he said, "if justice and injustice were merely popular opinion or a princely edict or a judicial sentence, that is, if law depended solely on the human will, we would have a law approving robbery, adultery, and the falsification of last testaments."[79]

In the writings of Ulpian, the renowned Roman jurist, we find mention of the just law. "Those who apply themselves to the study of law," he says, "should know in the first place, from whence the science is derived. The law obtains its name from justice, for (as Celsus elegantly says), law is the act of knowing what is good and just."[80] And again, "The science of the law is the acquaintance with Divine and human affairs, the knowledge of what is just and unjust."[81] And in the *Enactments of Justinian* we find, "Justice is the constant and perpetual desire to give to each one that which he is entitled. Jurisprudence is the knowledge of matters divine and human, and the comprehension of what is just and what is unjust."[82]

And so on down through the centuries the controversy of what is the true and false, the just and the unjust law, has beeen present. Today once more, in truth, that controversy has returned to the foreground. Pope Pius XII says that to-

[78] Aristotle, *Rhetoric*, I, XIII, 1 and 2. Loeb translation.
[79] Cicero, *De Legibus*, I, 16. Loeb translation.
[80] Ulpian, *Institutes*, Book I.
[81] Ulpian, *Rules*, Book I.
[82] *The Enactments of Justinian*, Book I.

day there is present the spectacle of a crisis in the administration of justice, a crisis having its immediate causes in juridical positivism and state absolutism and "summarized in the antagonism between the true and false law."[83] This controversy cannot be resolved and a solution cannot be reached unless jurists have the courage to lay aside erroneous concepts of man and law, to get to the bottom of the question and to see the real basic foundations in which all human law is rooted. One simply cannot know what is a just or unjust law unless he knows the norm by which every human law is compared and measured and to which it must conform. The Holy Father says:

> The profoundest or subtlest science of law could not point out a criterion for distinguishing just from unjust laws, simple legal law from true law, other than that which is already perceptible with only the light of reason from the nature of things and by man himself from the law written in man's heart by the Creator and expressly confirmed by revelation.[84]

Truly, if we are to have a solution to the present crisis, it is to be found in the Christian concept of the nature of man and the nature of law. The fact that penetrating jurists have applied themselves with serious interest to the study of the problem is to him, the Holy Father hopefully remarks, a "happy augury for the solution of the crisis."[85]

D. Pope Pius XII's Four Norms to Guide Judges Relative to Unjust Laws

Because of false ideas of the nature of man and law within the last three centuries, many unjust laws have been passed. In lands where Christian moral teaching has been rejected and especially when and where the Church has suffered persecution, cases have multiplied in which Catholic judges

[83] Pope Pius XII, "Address to the Sacred Roman Rota," *AAS*, 41 (Dec. 22, 1949), 605.

[84] *Ibid.*, p. 607.

[85] *Ibid.*

have been faced with the disquieting problem of the application of unjust laws. Catholic judges who are conscientious in their work are often troubled and uncertain as to how to act in their official capacity regarding these laws. It is a current problem. The Holy Father, therefore, in talking to the jurists, took advantage of the opportunity to talk of their problems and to enlighten them by reviewing four fundamental norms about the handling of such cases. The fundamental norms, or principles, the Holy Father laid down are not new. They are but the restatement and application of the Church's customary teaching and can be found in the many manuals of Catholic moral theology.[86]

1. First Norm—Responsibility of Judge

The first principle stated by the Holy Father is as follows:

> For every sentence there is the principle that a judge cannot simply throw responsibility for his decision from his own shoulders, causing it to fall on the law and its authors. Undoubtedly the authors are principally responsible for the effects of such a law. But the judge who applies it to a particular case by his sentence is a joint cause and thus jointly responsible for these effects.[87]

It is seen from the above words of the Holy Father that the first responsibility for an unjust law rests upon the authors of the law, the lawmakers. They have it as their duty to enact just laws. If the lawmakers pass an unjust law they are violating their office and are responsible for whatever evil effects flow from it. The responsibility here is very great both because of the dignity of the office of legislator and the possi-

[86] Noldin-Schmitt, *op. cit.*, II, pp. 667-668, n. 726 and I, pp. 117-121, n. 116-120; Arthur Vermeersch, S.J., *Theologiae Moralis Principia, Responsa, Consilia*, (Romae: Universita Gregoriana), 1924, II, p. 99-101, n. 142; Prümmer, *op. cit.*, II, p. 139, n. 154 and I, pp. 447-449, nn. 617-620; Merkelbach, *op. cit.*, II, p. 672, n. 637d and I, pp. 399-402, nn. 487-491; Genicot-Salsmans, *op. cit.*, II, p. 7, n. 4. and I, pp. 182-184, n. 235. *et alii.*

[87] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (Dec. 22, 1949), 602; *The Catholic Mind*, 48 (Jan. 1950), p. 57.

bility of widespread evil flowing from the unjust law. As the Prophet Isaias says: "Woe to them that make wicked laws: and when they write, write injustice."[88]

But if the author of the law has the first responsibility, he does not have the sole responsibility. The judge who by his judicial sentence puts into effect the unjust law has a share in it. As the Holy Father says, he is a "joint cause and thus jointly responsible." When the judge is faced with the problem of passing judgment according to the unjust law, he cannot merely shrug his shoulders and dismiss responsibility with the idea that the legislator has enacted the law. Nor can he take refuge in the fact that it is "the law." He too is an accessory, a cooperator, and shares the responsibility for the evil done, if he inflicts the law's injustice upon his fellow citizens. In commenting upon this first principle, Father Connell says: "The Pope asserts that the judge may not lay the entire responsibility for the injustice of a sentence which he passes on the law and the lawmakers. In other words, when he passes sentence in accordance with a law he is convinced is unjust he may not salve his conscience by saying that he is merely the mouthpiece of the law. It is true, the principle responsibility rests in those who have passed the law; but he is an accessory."[89]

The judge is the administrator of justice; how can he administer justice if he is asked to apply a law that is filled with injustice? A solemn responsibility he cannot shirk rests upon the shoulders of the judge as soon as he recognizes the injustice of a law he is asked to enforce.

Such a judge is faced with a dilemma. He finds himself caught in the conflict of two different principles. First he knows that as a judge he is a public officer required in the proper conduct of his office to give judgment according to the law of the land.[90] The law he has before him to apply

[88] *Isaias* 10,1.

[89] Francis J. Connell, *The Record*, Nov. 19, 1949, p. 8.

[90] *Corpus Juris Secundum* Vol. 48, p. 1009, note 87; *American Jurisprudence*, Vol. 30, p. 744.

has been duly enacted. It has been passed by the lawmakers as the expression of the voice of the people. It is indeed the law of the land. He realizes he is being asked to give a decision according to it. On the other hand, he realizes it is an unjust law, that it violates in some way the divine law, positive or natural, and that if he applies it, he shares in the moral wrong and arrogant act of setting aside God's law. The judge is forced into the dilemma of either disregarding the law of God and acting according to a practical positivism which gives a legal justice to the unjust law, or of obeying God's law and suffering the positivist's criticism of disloyalty to country and possible loss of office. The truth of the matter is that the unjust law is no law at all. It simply cannot have validity if it is contrary to the law of God from whom all ruling authority comes. The judge therefore does not violate his office if he refuses to apply it. And no government can rightly demand its application. As St. Peter and the apostles declared, God's law is first. It must be obeyed.[91]

All the Holy Father wishes to say in his first principle is that if the judge despite the injustice of the law applies it, he shares responsibility for the evil done. There are instances when a judge may apply and without personal guilt allow an unjust law to take its course, as we shall see later. But in cases when this is not permitted the judge cannot escape responsibility by claiming that the lawmakers are entirely at fault for making the law and he not at all for applying it.

Legal positivists cannot be expected to agree with the above stated principle, nor with its explanation. They know of no immutable objective standard by which laws are judged. They will counter with the thought that the lawmakers, the legislators are the ones to make the laws. The judge's duty is to impose them, to apply them, no matter what the law might demand. If he can't fulfill this duty he

[91] *Acts of the Apostles* 5, 29ff.

is unworthy of his office, ought to step down from the bench and surrender it to someone else who will apply the law.

These very ideas and demands were expressed in the press of the United States in November of 1949, when the Holy Father's talk to the jurists was published. For example the following appeared as part of an editorial in the Washington-Post on November 7.

> Actually, of course, no judge in the United States has any obligation, as a judge to any ecclesiastical authority. Our judges obtain their authority solely from the Constitution and the law of the land... Any man on the bench who is worthy of the trust imposed in him thinks not as a Catholic, Protestant or Jew but as an impartial judge sworn to uphold the laws that the representatives of the people have enacted.[92]

And again on November 14, in an editorial of the same newspaper:

> He the judge is an agent of the Nation (or the State) sworn to uphold its laws. In his function as a judge he owes no obligation to any church or any religious doctrine... we think it is important to remember that his duty as a judge is to apply the law of the land as it has been constitutionally enacted.[93]

In the above quotations no distinction is made between the just and unjust law. It is presumed that in every case the judge must apply whatever is the law, and hence we must concluded that this is so even should the law entail the rankest sort of injustice.

Yet it is interesting to note that the principle the Pope calls to the minds of jurists the world over, that the judge shares responsibility with the lawmaker for the evil done in applying an unjust law, is nothing more than the principle of an objective standard of justice and morality and of the individual responsibility of officials for unjust governmental acts contrary to that standard, which our own gov-

[92] *Washington-Post*, Nov. 7, 1949, Editorial page.
[93] *Washington-Post*, Nov. 14, 1949, Editorial page.

ernment officially expressed in the Charter of the International Military Tribunal and applied in this Tribunal's subsequent war criminal trials. The Charter of this Tribunal provided "for the just and prompt trial and punishment of the major war criminals of the European Axis."[94] It was agreed to and signed by the four powers, the United States, France, Great Britain and Russia, on August 8, 1945, at London, and the trials began November 21 of that same year at Nurnberg, Germany.

Article 6 of the Charter listed the crimes coming within the jurisdiction of the Tribunal, for which crimes, it said, there would be "individual responsibility." It listed three types of crimes: (1) Crimes against peace, such as, the planning, preparation and initiation of a war of aggression in violation of international treaties; (2) War crimes, that is, violations of laws and customs of war, such as, murder, ill-treatment of slave labor and prisoners of war, killing of hostages, etc.; and (3) Crimes against humanity, such as mass murders, extermination, deportation, enslavement and other inhuman acts against civilian population "whether or not in violation of domestic law of the country where perpetrated." After listing these crimes the Charter continued:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.
>
> Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.
>
> Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be

[94] Charter of the International Military Tribunal, Article 1, cf. R. H. Jackson, *The Nurnberg Case*, p. 21.

considered in mitigation of punishment if the Tribunal determines that justice so requires.[95]

In clear words the Charter first proclaims the responsibility of the "leaders, organizers and instigators," those who conceived the execution of an iniquitous plan by means of laws and decrees directing criminal acts. Theirs is the greatest responsibility. But the Charter also holds "accomplices" responsible. Neither does it permit one's official position in government, nor the fact that an inferior carried out the order of his government or superior to be used as a claim for freedom from responsibility. Judges of the courts hold official positions. They were needed in the courts to carry into effect the evil laws and decrees and orders of the government. The judges who applied these laws and decrees cannot escape responsibility. They too played their part in the injustices committed.[96]

Placing side by side the words of the Charter and the words of the Holy Father to the jurists on this point clearly shows the identity of the enunciated principle. The Charter said: "The official position of defendants shall not be considered as freeing them from responsibility... The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility."[97] The Holy Father said: "... a judge cannot simply throw responsibility for his decision from his shoulders causing it to fall on the law and its authors... the judge who applies it (an unjust law) ... is a joint cause and thus jointly responsible..."[98]

As Mr. Justice Jackson said in his speech opening the case before the Tribunal, he expected the accused to take refuge in a plea of irresponsibility, since their evil deeds they could not deny in face of documented evidence. "We doubt very much whether it will be seriously denied that the crimes I have outlined took place. The effort will undoubted-

[95] Cf. Jackson, *The Nurnberg Case*, p. 23.
[96] Jackson, *Ibid.* p. 125 and notes on pp. 164-65.
[97] Cf. *supra* note 95.
[98] Cf. *supra* note 87, p. 112.

ly be to mitigate or escape personal responsibility."[99] That this view was correct is shown in Justice Jackson's closing address where he says: "In opening the case I ventured to predict that there would be no serious denial that the crimes charged were committed, and that the issue would concern the responsibility of particular defendants. The defendants have fulfilled that prophecy . . . The argument runs that they all had to obey Hitler's orders, which had the force of law in the German state, and hence obedience cannot be made the basis of a criminal charge. In this way it is explained that while there have been wholesale killings, there have been no murderers. This argument is an effort to evade Article 8 of the Charter. . . . This provision of the Charter corresponds with the justice and the realities of the situation. . . ."[100] "The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of state."[101]

It will be noticed too, and this is an important fact for today's jurisprudence, that natural law concepts were used throughout the trial of the war criminals, that the Charter recognized basic objective human rights as an objective measure of the unjustness of laws passed, of decrees and orders issued. There is no offense, no crime committed unless it is against some rule or norm or measure. And the norm used by the Tribunal in its Charter and in the prosecution of the case was the basic human rights of life, liberty and the pursuit of happiness with which God has endowed every human being, which are inherent in man's very nature. Relative to this particular point the natural law is not specifically mentioned, but natural and inalienable rights are mentioned and other words meaning the same thing are used.[102] Witness the following thoughts voiced in the conduct of the Nurnberg Trials.

[99] Jackson, *op. cit.*, p. 91. [100] *Ibid.* pp. 151-2. [101] *Ibid.*, p. 88.
[102] Cf. John P. Kenny, *Moral Aspects of Nuremberg*, (Washington, D.C.: The Thomist Press, 1949), p. 160; Robert H. Jackon, "Nuremberg in Retrospect: Legal Answer to International Lawlessness," 35 *American Bar Association Journal* (Oct. 1949) 885.

> We do not accept the paradox that legal responsibility should be the least where power is the greatest. We stand on the principle of responsible government declared some three centuries ago to King James by Lord Chief Justice Coke, who proclaimed that even a King is still "under God and the law."[103]
>
> Those acts which offended the consciences of our people were criminal by standards generally accepted in all civilized countries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted.[104]
>
> Our people felt that these were the deepest offenses against that International Law described in the Fourth Hague Convention of 1907 as including the "laws of humanity and the dictates of the public conscience."[105]
>
> I believe that those instincts of our people were right and that they should guide us as the fundamental tests of criminality. We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.[106]
>
> The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and nontechnical.[107]
>
> After the shock to civilization of the last World War, however, a marked reversion to the earlier and sounder doctrines of International Law took place.[108]

The Charter mentions "Crimes against humanity" and "inhumane acts."[109] It looks upon the rights of humanity as more basic than the domestic law of a country when it

[103] Robert H. Jackon, "Report to the President," *The Nurnberg Case*, p. 8; cf. also "Opening Statement," *op. cit.*, p. 80.
[104] *Ibid.*, "Report to the President," p. 11.
[105] *Ibid.*
[106] *Ibid.*, p. 12.
[107] *Ibid.*, p. 14.
[108] *Ibid.* p. 15.
[109] Charter of the International Military Tribunal, *ibid.* p. 23.

says that such crimes shall be punished "whether or not in violation of domestic law of the country where perpetrated."[110]

> These men created in Germany, under the *Fuhrerprinzip*, a National Socialist despotism equaled only by the dynasties of the ancient East. They took from the German people all those dignities and freedoms that we hold natural and inalienable rights in every human being.[111]
>
> The age of imperialistic expansion during the eighteenth and nineteenth centuries added the foul doctrine, contrary to the teachings of early Christian and International Law scholars such as Grotius, that all wars are to be regarded as legitimate wars . . . The sum of these two doctrines was to give war-making a complete immunity from accountability to law. This was intolerable for an age that called itself civilized. Plain people, with their earthy common sense, revolted at such fictions and legalisms so contrary to ethical principles and demanded checks on war immunity.[112]
>
> As an International Military Tribunal, it rises above the provincial and transient and seeks guidance from International Law but also from the basic principles of jurisprudence which are assumptions of civilization and which long have found embodiment in the codes of all nations.[113]

Justice Jackson says the Charter and the work of the International Military Tribunal has done a vast service by putting "International Law squarely on the side of peace as against agressive warfare, and on the side of humanity as against persecution."[114] But perhaps it might be said that the principal contribution of this trial and its Charter is its insistence on the individual responsibility of government officials for deeds of office and its recognition of basic human rights as a norm for just government's laws, decrees

[110] *Ibid.*
[111] *Ibid.* p. 32.
[112] *Ibid.* p. 83.
[113] *Ibid.* p. 122.
[114] R. H. Jackson, *The Nurnberg Case*, p. xvii.

and orders in a world and at a time when juristic philosophies which deny God, his law, the natural law and natural rights, still prevail. The condemnation of the accused and the penalties they received as guilty manifest the degradation to which a jurisprudence of legal positivism can lead. According to juridical positivism these men did no wrong. They acted according to the laws they enacted. They should not have been punished—which really doesn't make sense—as if crime were less a crime when performed by men as leaders of nations. Perhaps the only black mark that can be found with the Tribunal is the fact that Soviet Russia had a part in passing judgment. While not questioning the justice and good intentions of the other countries, we can be sure that Russia found the misdeeds of the Nazis illegal, not because these acts were opposed to the natural law, but because they were opposed to Russia's own proletarian revolution. In the trials that country found a conveniently legal democratic way of disposing of persons she would have gotten rid of more deftly if left to her own devices.

In his talk to the Sacred Rota, in November of 1949, the Holy Father said this about the Nurnberg trials:

> This, we are forced to say, was and still is the "legal right" in some places. We all have witnessed how some, who had acted according to this right, were later called to render account before human justice. Those trials have not only brought real criminals to the fate they deserved. They have also shown the intolerable condition to which a law of state completely dominated by juridical positivism can reduce a public official, who otherwise by his nature and left to his own sentiments would have remained an honest man.
>
> According to the principles of juridical positivism, it has been pointed out, those trials should have ended with as many acquittals, even in cases of crimes repugnant to human feeling and filling the world with horror. The accused were, so to speak, covered by the "law in force." Of what were they actually guilty if not of having done what this law prescribed or permitted?

> We certainly do not intend to excuse the truly guilty, but the greater responsibility falls on the prophets, proponents and creators of a culture, a power of state, a legislation which does not recognize God and His sovereign rights. Wherever these prophets were and are still at work, there must rise an renewal and a restoration of true juridical thought.[115]

When Pope Pius XII calls attention to the responsibility that rests on the shoulders of judges should they make application of unjust laws, he is but restating a fundamental principle of Catholic moral theology. Moreover, he is advocating nothing more than the very same principle our own government declared and used at Nurnberg in its condemnation of the War Criminals.

2. Second Norm—Judge May Not Command Action Intrinsically Evil

The second norm or principle laid down by the Holy Father declares the judge may never oblige a person to perform an intrinsically immoral action.

> A judge may never by his decision oblige anyone to commit an act intrinsically immoral, that is to say, an act which is by its very nature contrary to the law of God and the Church.[116]

An intrinsically immoral action is one which is evil in its very nature.[117] It is an action in itself, in its own constitutive elements, in its essential make-up, contrary to the law God has implanted in the nature of things, an action not conformable to right reason and order, and forbidden by God precisely because it is inordinate.[118] The judge, even under the direction of the civil law, can never oblige the performance of any such action, for human legislation and judicial action cannot set aside the natural order established by

[115] Pope Pius XII, "Address to the Sacred Roman Rota," *AAS*, 41 (Dec. 22, 1949), 606-7.

[116] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (Dec. 22, 1949), 602; *The Catholic Mind*, 48 (Jan. 1950), p. 57.

[117] Merkelbach, *op. cit.*, I, n. 122, p. 111.

[118] Slater, *A Manual of Moral Theology*, I, p. 44.

God.[119] And if the law should command an action in itself immoral, the judge cannot apply it. The judge, for example, can never by a decision oblige a person to deny the existence of God, to blaspheme God, or to take the life of an innocent person, or command that eugenic sterilization be inflicted on another.

It will be noticed in this second principle that the Holy Father speaks of an action intrinsically evil as one contrary by its very nature to the law of God and the Church. When he speaks of an intrinsically evil action as one contrary by its very nature to the law of God, he refers to that law God has established in the nature of things, the natural law. He does not refer to actions forbidden by the divine positive law alone for these become evil not because they are intrinsically evil, but because they have been forbidden by the divine will. When the Holy Father speaks of an action intrinsically evil as one contrary to the law of the Church, he is referring to actions forbidden by the Church acting as the teacher of the law God has implanted in nature. He is not referring to actions forbidden by the Church merely through her positive law, for these also are not intrinsically evil, but become forbidden because enacted by rightful ecclesiastical authority. It is also true, as we shall later see in discussing the third norm laid down by the Holy Father, that the judge in most cases may not command actions which are contrary to the positive laws of the Church. But it is not these actions the Holy Father calls intrinsically evil. When the Holy Father speaks of intrinsically evil actions, he is referring to actions which in their intrinsic make-up are opposed to God's naturally established order, or to actions forbidden by the Church officially teaching what is not permitted in that natural order.

The Church has been established by Jesus Christ, true God and true man, as the custodian of divine truth here on earth. It is her right and duty to teach definitively of matters pertaining to correct faith and morals.

[119] Noldin-Schmitt, *Summa Theologiae Moralis*, II, p. 668, n. 726.

Now it has been found true that as men begin to make conclusions from the generally known and common principles of the natural law, or to apply them to more determined and particular instances, there is danger of error. While the general principles are easily understood, their application to concrete cases at times is difficult, and we have the possibility of erroneous teachings. That all men might the more easily come to a true knowledge of what is right and what is wrong, God made known to us his divine positive law, repeating in it the most important requirements of the natural law. Yet, even with divine revelation, man falls into error in his judgments of moral right and wrong. The following are some points in evidence of this. We have from Christian teaching the commands "Thou shalt not kill" and "Blessed are the merciful for they shall obtain mercy" and the lesson of the value of suffering from Christ's example. The difficulty some minds left to themselves find in a reconciliation of these three have lead many to ascribe to the supposedly humanitarian, though intrinsically evil doctrine of euthanasia or mercy killing. Some today find it difficult to understand that birth prevention is contrary to the natural law and hence intrinsically evil. Others favor (and have succeeded in having legislation established calling for) instrinsically evil eugenic sterilization. It is not that these things cannot be understood correctly. Errors are begotten, lived by and handed down because of neglect of education, evil habits and customs, and blinding prejudices, all of which hinder correct reasoning.

Hence there arises the need for an authority to tell us the correct meaning of the natural law. The Catholic Church, established by Jesus Christ and guided by the Holy Spirit, is that authority, that official teacher in matters of faith and morals. It is her duty to keep alive for all time the true meaning and explanation of God's law. As in the past, so today does the Church fulfill her mission in declaring to a world which finds it hard to accept the truth that euthanasia, birth prevention and eugenic sterilization are contrary to the laws of God.

Should a law be passed by the legislators which demands actions intrinsically evil, the judge can never by his sentence enforce it. The judge, therefore, even if he should be forced from his office, is never permitted by his decision to command an action which is in its very nature opposed to the natural order established by God and the Church's teachings as to what is the true meaning, and explanation of that natural order as expressed in her laws, decrees and the common teaching of her theologians.

Should the judge command an intrinsically evil action, he sins against legal justice in not properly fulfilling his office and he also formally cooperates in the resultant evil. He commits a sin of scandal against the virtue of charity in leading another into sin. Even should the judge declare that he has no will to command evil, saying that he merely fulfills the demands of the law, he still formally cooperates in the evil done, since his decision in its very nature is ordered to sin alone in directing the performance of an intrinsically evil action. Needless to say, should a judge command an intrinsically immoral action, his decision is not binding in the least, since he exceeds his authority.

3. Third Norm—Judge Cannot Approve an Unjust Law

The third principle is concerned with the express recognition and approval of an unjust law. Of the judge, the Holy Father says:

> He can in no case expressly recognize and approve an unjust law—which for that matter would never constitute the foundation for a judgment valid in conscience and before God. Therefore, he cannot pronounce a penal judgment which would be equivalent to such approval. His responsibility would be even graver if his judgment were to be a cause of public scandal.[120]

In this third principle the Holy Father makes four points

[120] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (Dec. 22, 1949), 603; *The Catholic Mind*, 48 (Jan. 1950), 57.

or conclusions. First he declares the judge may in no case expressly recognize and approve an unjust law. The words "in no case expressly recognize and approve" mean that the judge can never say or do anything which would indicate his personal approval or favor of the unjust law. For example, the judge could not make a public speech in behalf of such a law. In the Communist dominated countries of our time, laws have been passed forbidding protests against the tenets of Communism. A judge who after punishing a victim according to the Communistic law (permitted in some cases, as we shall see) would then give a speech upholding the Communistic law would offend against this principle. Neither can the judge privately declare his approval of unjust laws. Nor can the judge perform any action which would amount to an express recognition and approval of the law. He could not, for example, attend a meeting if his presence there would be interpreted as lending approval to unjust laws, or if the meeting itself were held for the purpose of furthering such laws.

As a second point, by way of parenthesis, the Holy Father says, and it is clearly seen, that an unjust law is never a valid law and, therefore, never the basis for a valid judgment which would bind in conscience and before the eyes of God.

As a third point, the Holy Father declares that the judge may not pronounce a penal judgment which would be equivalent to an approval of the unjust law. Later, in stating the fourth principle, the Holy Father says that not every application of an unjust law necessarily means its recognition and approval. There are occasions, then, when an unjust law may be applied, and its application by the judge does not necessarily mean that the judge expressly recognizes and approves it. However, if the application of it, or the applying of penal judgments in accordance with it, will be taken as, or amount to, an express recognition and approval of the unjust law, the judge can never apply it or pronounce the penalty. For example, if in a Communistic country the judge

should be faced with the necessity of inflicting a penalty upon a priest who has violated a law making it a crime for him to administer the sacraments to his Catholic people, and if public circumstances are such that the public mind will interpret the infliction of the penalty as the judge's approval of the unjust law which makes such ministration a crime, then, the judge may not inflict the penalty. The law is an unjust one. The judge's recognition and approval of it would make him a formal cooperator in its injustice. In this third point, the Holy Father applies the moral principles of cooperation in the evil act of another. If a judge directly or indirectly approves an unjust law, he sins in associating himself with the evil intention of the lawgiver or with the evil content of the law itself. The judge morally is not permitted to give approval. Should he, nevertheless, give express approval, he sins against his office and shares the responsibility for all the evil and injury done through the application of the law insofar as he is responsible for its application.

Finally, as a fourth point of this third principle, the Pope reminds the judge that if his approval of the unjust law causes public scandal in leading others into sin, in putting a stumbling block in the way of their salvation, his responsibility is greater and his sin increases in gravity.

4. Fourth Norm—Not Every Application of an Unjust Law is Equivalent to Approval

In stating the fourth principle or norm the Holy Father says that not every application of an unjust law to particular cases necessarily means its approval and the judge may, and at times perhaps must, allow the unjust law to take its course as the only means of a greater good or of impeding a much greater evil. The entire fourth principle is stated as follows:

> Nevertheless, not every application of an unjust law is equivalent to its recognition or approval. In this case, a judge may—sometimes, perhaps, must—allow an unjust law to take its course, whenever

> this may be the only means of impeding much greater evil. He may inflict a penalty for transgression of an unjust law if it is of such a kind that a person who is affected by it is reasonably disposed to submit to it in order to avoid that harm or assure a good of very much higher importance and if the judge knows, or can prudently suppose, that such sanction will be willingly accepted by the transgressor for higher motives. In times of persecution, priests and laymen have often allowed themselves, without offering resistance, to be condemned by Catholic judges to pay fines or to be deprived of personal freedom because of a transgression of unjust laws, when in that way it was possible to preserve an honest magistracy and to ward off from the Church and the faithful much more dreadful calamity.
>
> Naturally, when a sentence is of more serious consequences, all the more important and general must be the good that is to be safeguarded or the evil to be averted. There are, however, cases where the idea of compensation by means of the attainment of higher goods or prevention of greater evils cannot be applied, such as in the case of condemnation to death.[121]

In the above quotation the Holy Father makes a distinction between (1) a civil law that is unjust *in content*, that is, a law unjust in the very nature of the action which it commands or forbids (apart from the penalty attached to its violation), and (2) the penalty attached to the law and inflicted when the unjust law is violated. In our discussion of the fourth norm, let us make the same distinction. We shall consider first the application of a law that is unjust *in its content*.

The question arises, when can a judge allow a law unjust *in its content* to take its course in order to impede a much greater evil? In giving answer, consideration must be given to the different types of laws unjust *in content*. There are four classes of civil laws unjust *in content*. To the first class belong those civil laws which in forbidding or com-

[121] *Ibid.*

manding certain actions are opposed to the natural law, or to that portion of the divine positive law reflecting the natural law. Such civil laws are intrinsically evil. According to the Holy Father's second principle the judge may never by his decision command a person to commit an act intrinsically evil. Hence in his court of justice the judge may never permit a law which obliges a person to commit such an act to take its course, that is, he may never allow it to be put into effect in his court through proper court procedure. Therefore, what the Holy Father says in the above quotation about the judge at times allowing a law unjust *in its content* to take its course does not apply to laws commanding what is intrinsically evil, although, as we shall see, the judge may at times levy penalties for the violation of this type of unjust law.

The second class of laws unjust *in content* includes those which in forbidding or commanding actions are opposed to the divine positive law alone, or, in other words, opposed to that portion of the divine positive law which is beyond the natural law. Such civil laws are opposed to divine law and hence are unjust and invalid. Normally, even in the face of the danger of death, the judge is not permitted to allow such a civil law to take its course.[122] Nevertheless, there are some instances in which the judge may, perhaps even must, permit such an unjust law to take its course in order to impede a much greater evil. In order for us to understand under what circumstances the judge may or must permit it to take its course, we must make a distinction between negative and affirmative divine positive laws not contained in the natural law.

A negative law is one that forbids some evil action. We have, for example, the words of Christ, "He who is not with me is against me,"[123] which statement in its negative form forbids us to be against Christ, and which, in turn, forbids the profession of a false religion. Now, a negative divine

[122] Merkelbach, *Summa Theologia Moralis*, I, p. 256, n. 286.
[123] *Matthew*, 12, 30.

positive law of this second class binds "semper, et ad semper," that is, always and for always, at every moment of the time in which it endures.[124] Hence, since it binds in this manner, the judge is never permitted to allow an unjust civil law contrary to it to take its course. If, for example, in times of persecution civil authorities should enact an unjust law demanding that a Catholic perform some external act indicating his disbelief in or denial and repudiation of Christ and his revealed teaching, or the profession of a false religion, the judge would not be allowed to apply such a law. Therefore, what the Holy Father says about at times allowing a civil law unjust *in its content* to take its course in order to impede a much greater evil does not apply to unjust civil laws that are in opposition to a negative divine positive law not contained in the natural law.

An affirmative law is one that commands some good to be done.[125] The same words of Christ quoted above, "He who is not with me is against me," in their affirmative form, plus other precepts such as that of receiving baptism, command the open profession of the true faith.[126] Now, an affirmative divine positive law not contained in the natural law binds, as it is said, "semper, sed non ad semper," that is, always but not for always, or always but not at every moment of the time it endures. This is easily seen in that we are not obliged to make open profession of our faith at every moment. There are moments, then, when affirmative divine positive laws do not bind. Ordinarily they do not bind when very grave harm attends their fulfillment. A more propitious moment for fulfillment may be awaited. Nevertheless, such affirmative commands are obligatory even when very grave harm attends their fulfillment, when, if not fulfilled, graver harm will result to the common good, or when one's neighbor is in extreme spiritual necessity, or when there is question

[124] St. Alphonsus, *Theologia Moralis*, I, 101; Merkelbach, *op. cit.*, I, p. 218, n. 234.

[125] *Ibid.*

[126] Merkelbach, *op. cit.*, I, pp. 553-57, n. 711-715.

of hatred of religion or contempt of the Church.[127] Since an affirmative divine positive law is the law of God, in most instances the judge would not be permitted to let a civil law opposed to it take its course, for man cannot set aside divine arrangements. Since, however, there are times when an affirmative law does not bind, that is, when very grave harm attends its fulfillment, and its non-fulfillment in turn, will not cause graver harm to the common good, or to one's neighbor in extreme spiritual necessity, or to religion and the Church, then there are times when the judge, in view of impeding a much greater evil, may permit an unjust civil law opposed to an affirmative divine law not contained in the natural law to take its course. The judge may do so in order to impede a much greater evil which would result should he refuse to let the unjust civil law take its course. The Divine Lawgiver is thought to cede his rights in such cases.[128] If, for example, civil authorities should enact an unjust law forbidding Catholics openly to profess their faith, and the open profession of faith will result in great harm to Catholic people, and non-profession will not result in grave injury to the common good, to the spiritual good of one's neighbor or to the good of religion and the Church, then the affirmative divine positive law requiring open profession of faith ceases to bind, God is judged to cede His rights, and the judge, in view of impeding a much greater evil, e.g., the loss of his judgeship with the seating of a judge inimical to the cause of Christ or open persecution against the Church, which would result should he refuse to apply the law, is permitted to let the unjust law take its course.[129] He may even be obliged to do so if his refusal will result in the visitation of most serious evils upon the Church.[130]

Another example. In view of a much greater good, a judge in applying an unjust civil law opposed to the divine positive

[127] *Ibid.*

[128] Merkelbach, *op. cit.*, I, p. 256, n. 286.

[129] Merkelbach, *op. cit.*, I, p. 556, n. 715.

[130] *Ibid*, pp. 55-57, n. 713, 715; St. Thomas Aquinas, *Summa Theologica*, II-II, q. 3. a. 3, ad 2.

law of "Go, therefore, and make disciples of all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Spirit," could forbid a nurse to baptize the dying infants of non-Catholics if this is the means of warding off hatred and persecution of the Church. The common good of the Church is to be preferred to the individual good of the child, and Christ's command to baptize is thought not to bind in a particular instance when it will inflict grave harm upon the Church.[131]

Therefore, what the Holy Father says about allowing at times an unjust civil law to take its course in order to impede a much greater evil, is able to be, and at times must be, applied to unjust civil laws apposed to an affirmative divine positive law not contained in the natural law under the conditions indicated above. If confronted with the situation of applying such an unjust civil law, the Catholic judge ought to consult with the Ordinary of his diocese, both as to the question of the injustice of the civil law, and whether or not his application of it will impede a much greater harm.

The third class of civil laws unjust *in content* includes those which in forbidding or commanding actions are opposed to ecclesiastical law. For our purpose here we may make a threefold classification of ecclesiastical laws. First, the Church, through the native and proper power bestowed upon her by Our Lord, has enacted some laws which are a repetition, or an interpretation, determination or application of the divine-natural law, for example, when the Church forbids abortion,[132] birth prevention,[133] blasphemy,[134] and perjury.[135] If the judge is asked to apply an unjust civil law opposed to an ecclesiastical law of this type, he cannot do so, since the civil law is intrinsically evil, being contrary not only to ecclesiastical and divine positive law but the natural law as well.

[131] Merkelbach, *op. cit.*, III, p. 124, n. 150.
[132] Pope Pius XI, *Casti Connubii, Five Great Encyclicals*, p. 94-96.
[133] *Ibid.* pp. 92-94.
[134] *Codex Juris Canonici*, Canon 2323.
[135] *Ibid.*

Second, the Church has enacted some laws repeating, interpreting, determining and applying the divine positive law alone, or that portion of the divine positive law not contained in the natural law, for example, when the Church punishes heresy relative to revealed truth,[136] commands the open profession of the true faith in prescribing the reception of the sacraments,[137] and makes laws for the valid reception of matrimony.[138] Unjust civil laws of this kind are subject to the considerations made in the previous discussion of unjust laws opposed to that portion of the divine positive law not contained in the natural law.[139] If such unjust civil laws are opposed to a negative ecclesiastical law of the type we speak, the judge cannot permit it to take its course; if opposed to an affirmative ecclesiastical law of the type we speak, the judge would be permitted to let it take its course if the conditions mentioned in the previous discussion are fulfilled and in addition the judge obtains the necessary jurisdiction from proper ecclesiastical authorities.[140] The Ordinary of the diocese should be consulted regarding the necessary jurisdiction.

Third, the Church has also enacted some laws called strictly, purely or simply ecclesiastical laws, having a strictly ecclesiastical origin, apart from the natural and divine positive law, for example, the law of taking Holy Communion publicly to the sick[141] and the law of wearing clerical garb.[142] If a civil law unjust *in its content* is opposed to such a strictly ecclesiastical law, the judge has the duty to obtain jurisdiction from the proper Church authorities in order to pass sentence.[143] If time and circumstances in this instance do not permit him to obtain the required jurisdiction and neces-

[136] *Ibid.*, Canon 2315.
[137] *Ibid.*, Cf. Canons 737-770.
[138] *Ibid.*, Canons 1067ff.
[139] Cf. *supra* pp. 137-40.
[140] Noldin-Schmitt, *op. cit.*, II, pp. 667-8, n. 726.
[141] *Codex Juris Canoci*, Canon 847.
[142] *Ibid.*, Canons 136, 1 and 596.
[143] Noldin-Schmitt, *Ibid.*

sity demands, he can permit the unjust law to take its course as a means of avoiding the greater evil of having abuse heaped upon himself and the Church and harm done to the preservation of an honest judiciary by the possible loss of his office. The Church readily grants jurisdiction in such cases when request is made and can reasonably be presumed to grant it when it is impossible to make the required request.[144]

And now we come to a discussion of the fourth class of civil laws *unjust in content*. To this class belongs those laws which in forbidding or commanding actions are opposed to a purely human good in social living; that is, for example, such laws as do not lead to the common good but to the good of individuals, as when the denial of the right of the workers to engage in a just strike or the setting of wages at unjust levels is beneficial to a special group; or laws which exceed the authority of the lawgiver in civil matters, as when in democratic nations legislators enact laws exceeding constitutional limits; or laws which, even though intended for the common good, apportion proportionally unequal burdens on the people, as when tax laws fall too heavily on particular segments in the community. In many cases laws of this class are not easily seen as unjust. For example, it is difficult to say at what point proportionate tax laws become unjust to a special group. The presumption is in favor of the justice of the law in such a case that the order of society might be maintained. When such laws are obviously unjust the judge ought not to apply them, yet he can do so when the good order of the community demands, that is, in order to avoid scandal or disturbance, or when should he refuse to do so the security of his office would be at stake with much greater resultant harm. St. Thomas says that these unjust laws opposed to a human good do not bind in conscience "except perhaps in order to avoid scandal or disturbance, for which cause a man should yield his right."[145]

[144] *Ibid.*, p. 663, n. 720; Cf. *Codex Juris Canonici*, Canon 2205, 2.
[145] *Summa Theologica*, I-II, q. 96, a. 4; Cf. *supra* p. 82.

He envisions, therefore, their binding in conscience at times, in order to avoid "scandal or disturbance." Pius XII further indicates that the Catholic judge may allow them to take their course if this is the only way to avoid a much greater evil which would result if he refused to pass judgment according to them. It is understood, of course, the application of the law is not to give express recognition or approval of it. The judge, nevertheless, ought to do what he can to set aside all unjust laws by seeking their repeal in legislative assemblies, or by initiating proceedings in the courts for a declaration of unconstitutionality.

Not only does the Holy Father say that the judge at times is permitted to apply a law unjust *in content* in the cases mentioned above, he also envisions occasions when the judge's application of it would border on obligation. He says sometimes the judge "perhaps, must" allow a law unjust *in content* to take its course. Where grave harm would result to the Church or to the body of citizens if the evil law is not applied in those cases where application is permitted, it seems the judge would have the obligation to apply it.

We have spoken of laws which *in their content*, that is, in what they forbid or command, are unjust. We have said that if such laws, apart from the penalty involved, are opposed to the natural law or to the divine-positive law or the ecclesiastical law expressing the natural law, the judge can never have a part in their application. If civil laws unjust *in their content* are in opposition to the divine positive law alone or to ecclesiastical law expressing the divine positive law alone negatively expressed, then the judge may never apply them, but if they are in opposition to said laws affirmatively expressed, the judge, in order to impede a much greater evil, may apply them in particular cases, when their non-application would cause grave harm, and the non-fulfillment of the said affirmative law would not cause grave injury to the common good, to one's neighbor, or to the Church, in which case God is thought to cede his rights. In addition the judge would have to obtain jurisdiction in re-

spect to the said affirmative ecclesiastical law. If civil laws unjust *in their content* are opposed to strictly ecclesiastical laws, the judge, lacking jurisdiction, needs to obtain it from proper Church authorities before applying the law in order to obtain a greater good. This jurisdiction, however, the judge may presume if it is impossible to make the required request. If civil laws unjust *in their content* are opposed to a human good in society, the judge may, and perhaps must in some instances, apply them to specific cases when a much greater evil is avoided or a much greater good is obtained. However, in all these instances the judge may never give his express approval to the unjust law.

Now we come to discuss the judge's obligations regarding penalties attached to the violation of these unjust laws. The person who violates an unjust law is strictly speaking not guilty of a true offense, since the law being unjust is really no law at all. May the judge, therefore, punish a person violating the unjust law, who in reality is an innocent person? Now to punish an innocent person is an evil. The Pope in restating the common Catholic moral position, says that in certain cases and circumstances the judge may inflict the penalty. He may inflict a penalty for the transgression of an unjust law if two conditions are fulfilled: (1) if the penalty itself is of such a nature that the transgressor is reasonably disposed to submit to it in order to ward off a much greater evil or in order to insure a much greater good, and (2) if the judge can prudently suppose the penalty will be willingly accepted by the transgressor for higher motives.[146] These conditions apply to the penalties attached to the violation of all four classes of unjust laws, whether opposed to the natural law, divine positive law, ecclesiastical law or to a human good in society. While, as was pointed out before, the judge may never apply a law, which *in its content,* in the act it commands or forbids, is opposed to the natural law, to the divine-positive law or ecclesiastical law expressing the natural law, or to the divine positive law alone negatively

[146] Cf. *supra*, p. 128, note 121.

expressed, or to ecclesiastical law expressing the divine positive law alone negatively stated, it is clear he can impose the penalties attached to the transgression of such laws when the proper conditions are present, that is, when the penalty of its very nature can be deemed as acceptable in view of the good to be obtained or evil avoided, and the victim is willing to accept it.

The Holy Father points out that oftentimes priests and laymen in times of persecution of the Church have willingly accepted such penalties offering no resistance to them in order to preserve an honest judiciary and to prevent evil to the Church and its members. A light penalty bringing a much greater good in its nature could be called acceptable. But the Holy Father declares that if a serious penalty is involved, such as a very heavy fine, or a long imprisonment, then the good obtained and the evil avoided by its acceptance must be of a more important and general nature, if the judge is to be justified in inflicting it. Should the penalty be severe, and the benefit of its acceptance small, the judge may not inflict it, since the penalty is altogether out of proportion to the good obtained. In no case the Pope says, no matter what the good obtained or evil avoided, may the judge condemn the innocent person to death. This penalty is of such a grave nature that the judge may not inflict it, no matter how willing the innocent person to accept it. Rather than levy such a judgment, the judge is held to resign his office.

It is noticed the Holy Father maintains, as a second condition for the infliction of an unjust penalty, the willingness, or the reasonably presumed willingness, of the victim to accept it for a higher motive. Should he be unwilling, or should the judge not be able reasonably to presume his willingness, (or at least the unreasonableness of his unwillingness), it seems the judge may not impose any penalty whatsoever on the innocent person.[147] We venture to say that in most cases involving only a slight penalty with resultant

[147] Noldin-Schmitt, *op. cit.*, I, p. 668, n. 726; Harding, *op. cit.*, p. 3347.

great good, the judge can reasonably presume its willing acceptance by the innocent party, and further, should the innocent party be unreasonably unwilling insofar as he lacks the Christian charity to undergo a slight punishment in view of a much greater good, it seems the judge may inflict the penalty anyway. The judge, however, may not apply any penalty at all if it gives express recognition and approval of the law.

There remains one more point to discuss here. What if the judge is doubtful about the justice of a law he is asked to apply? It is first of all required of him to do what he can to clear up the doubt. This can be done by further study, by consultation with other men learned in the law, and by seeking the point of view of the Church, the official guardian of matters of faith and morals. If doubt still remains, presumption is in favor of the lawgiver that he has acted rightly for the good of society, and the law is to be considered just, according to the principle, "Lex in dubio praesumitur justa,"[148] except in those cases wherein its fulfillment would be exceedingly difficult, or cause grave harm to citizens.[149] In these latter instances the judge will apply the principles applicable to unjust laws.

E. Application of Norms to Unjust Laws in the United States

Having reviewed the fundamental norms stated by Pope Pius XII regarding the judge and unjust laws, it remains now to apply them to existing and possible unjust laws in our own country. Unjust laws have been passed in our land and are now on the statute books of different states—laws which legalize eugenic sterilization, which permit and protect the sale and dissemination of contraceptive devices, divorce laws and some laws which are opposed to the good order of society in apportioning proportionally unequal burdens on special groups. Attempts have also been made and

[148] Cf. St. Alphonsus, *Theologia Moralis*, I, n. 99; II, n. 617.
[149] *Ibid.*

possibly will be made in the future to legalize euthanasia or mercy killing. These laws and the possibility of the enactment of future unjust laws give rise to practical moral problems for the Catholic judge to which he must apply sound Christian moral principles. We shall here discuss eugenic sterilization, euthanasia, cases in which the dissemination of contraceptive devices and information are concerned and some aspects of tax laws, and make application of the norms laid down by the Holy Father. Divorce and divorce laws will be discussed in the next chapter.

1. Sterilization Laws

Sterilization is a term applied to an operation by which a person is rendered incapable of the procreation of offspring. The effect of the operation is to make propagation impossible, which effect is secured by preventing the male and female reproductive elements from approaching one another.[150] This effect of human sterility can be procured in a variety of methods both for the male and for the female.[151] The most common method of sterilization for the male, and the method most favored by eugenists, is that of vasectomy, which consists of ligating and resecting each of the vasa deferentia, thus preventing the spermatazoa, the male fecundating element from flowing from the testes to the seminal vesicles where it is stored for use. Instead the spermatazoa pass into the blood stream. The operation itself is very simple and a minor one to perform. It takes only a few minutes and may be done without anaesthetic. The result, however, is sterility, a major biological defect, a very grave mutilation inasmuch as it deprives man of his natural power of reproduction.[152]

The most common method used in the sterilization of the

[150] Henry Davis, S.J., *Moral and Pastoral Theology*, (London: Sheed and Ward, 1945), II, p. 156.

[151] Joseph B. Lehane, *The Morality of American Civil Legislation Concerning Eugenical Sterilization*, (Washington, D. C.: The Catholic University of America Press, 1944), pp. 2-3.

[152] *Ibid.*, p. 76.

female is called salpingectomy or fallectomy, which consists of a simple cutting or ligation of the fallopian tubes. This prevents the ovum, the periodic female reproductive germ cell, from making its natural way from the ovaries through the fallopian tubes to the uterus, in the course of which transit conception normally takes place. Salpingectomy produces permanent sterility and is a major operation beset with danger to the patient.[153]

According to the reasons advanced for its administration, sterilization may be of three different kinds—therapeutic, if it is administered for its curative effect upon an ill body; punitive, if given as a punishment; and eugenic, if administered as a means to promote the betterment of the race by preventing the propagation of undesirable or defective stock.[154]

Therapeutic sterilization is permissible if it is necessary in order to save the life or the health of an individual. According to true Catholic moral principles, mutilation of the human body without reason is gravely wrong. Man's body is sacred and holy. It is a gift of God. The inviolability of the human body is a basic Christian moral principle, and neither man nor the state is permitted to tamper with the body's integrity or its proper functions without good reason. When, however, the preeminent good or health of the whole body is threatened by a diseased part or member, and a sterilization operation is a necessary provision to ward off that threat, then the operation may be performed. Therapeutic sterilization, therefore, if it is truly a necessary means to promote the good of the whole creature, is morally permissible.

> Furthermore, Christian doctrine establishes, and the light of human reason makes it most clear, that private individuals have no other power over the members of their bodies than that which pertains to their natural ends; and they are not free to destroy or mutilate their members, or in any other

[153] *Ibid.*, p. 5.
[154] *Ibid.*, p. vii.

> way to render themselves unfit for their natural functions, except when no other provision can be made for the good of the whole body.[155]

Catholic moral theologians also regard it as probable that the state has the right to use sterilization precisely as a punishment, apart from any eugenic consideration, for serious crime, although some deny the state this right.[156] However, those who admit it seriously question its fittingness and its effectiveness as a punitive measure.[157] Speaking of mutilation as a punishment, St. Thomas says:

> Hence just as public authority licitly can deprive a person of life itself because of certain major, crimes, it can deprive him of a member because of certain lesser crimes.[158]

In his encyclical Casti Connubii, Pope Pius XI seems to permit the state the use of punitive sterilization.

> Public magistrates have no direct power over the bodies of their subjects: therefore, where no crime has taken place and there is no cause present for grave punishment, they can never directly harm or tamper with the integrity of the body either for reasons of eugenics or for any other reason.[159]

There are in these words no positive approval of punitive sterilization. The words "where no crime has taken place and there is no cause present for grave punishment, they can never directly harm ... the integrity of the body" seem to imply, however, that if a crime has taken place and a cause is present for grave punishment, the state can directly harm the integrity of the body and in this instance exact the punishment of sterilization.[160]

In 1940 the question was asked the Holy Office:

> Whether the direct sterilization of man or woman, whether perpetual or temporary, is licit.

[155] Pope Pius XI, *Casti Connubii, Five Great Encyclicals*, (New York: Paulist Press), p. 97.

[156] Noldin-Schmitt, *op. cit.*, II, p. 314, n. 328.

[157] Lehane, *op. cit.*, p. 92; Merkelbach, op. cit., II, p. 373, n. 370.

[158] *Summa Theologica*, II-II, q. 65, a. 1; cf. II-II, q. 64, a. 2.

[159] *Casti Connubii, op. cit.*, pp. 96-97.

[160] Cf. Henry Davis, *op. cit.*, II, p. 160.

> Reply. In the negative; it is forbidden by the law of nature, and, as regards eugenic sterilization, it has already been condemned by the Decree of this Sacred Congregation, of 21 Mar., 1931.
> Approved, confirmed, and ordered to be published by His Holiness, Pius XII in the Audience of 22 Feb., 1940.[161]

Some authors say the above response of the Holy Office forbids punitive sterilization in its disapproval of "direct sterilization" as contrary to the law of nature.[162] Yet if we interpret the words "direct sterilization" strictly, then it seems that the response would also disapprove therapeutic sterilization as well. Now we know from the general teaching of the theologians and from Pius XI's encyclical *Casti connubii* that proper therapeutic sterilization is considered lawful. Some reliable theologians also teach that the state probably has the right to the use of punitive sterilization. It is thought, therefore, the words "direct sterilization" in some way must refer to eugenic sterilization and to those so-called "therapeutic" sterilizing operations which are resorted to by some without reason merely for the purpose of relieving one of the "burden" of having children, operations, which, of course, are unlawful and are forbidden by the law of nature, but not as referring to the proper therapeutic or punitive sterilization.

The state probably has the right of using sterilization precisely as a punishment apart from eugenic considerations for a serious crime, as we have said. But it is neither fitting to human dignity nor is it an effective punitive measure. Some courts have declared it a "cruel and unusual punishment."[163] Legalists join with moralists in questioning its

[161] Bouscaren, *Canon Law Digest*, II, p. 96; *AAS* 32 (March 5, 1940), 73.

[162] Cf. McCarthy, *Irish Ecclesiastical Record*, LXX, (Nov. 1948), 1013-18; Gerald Kelly, S.J., "Notes on Moral Theology," *Theological Studies*, (Jan. 1950), pp. 42-44.

[163] Davis v. Berry, 216 Fed. (June 24, 1914), 413; Mickle v. Henrichs, 262 Fed. (May 25, 1918), 687-91; Cf. also Skinner v. State of Oklahoma, 316 U.S. (June 1, 1942), 535.

effectiveness as is indicated by the following quotation from *American Jurisprudence.*

> Sterilization, viewed solely as to its effectiveness as a punishment, its value as a deterrent, and as a means of reformation may well be questioned. For inasmuch as sterilization does not affect the physical capacity of the individual to perform the sexual act, but merely destroys the ability to procreate, its only effect would be to lessen the danger of detection . . .[164]

While proper therapeutic and punitive sterilization is permitted, eugenic sterilization, effected for the purpose of bettering the race by preventing the propagation of unfit offspring, is contrary to the natural rights of man and therefore an intrinsic evil. As such it is an immoral operation and is never permitted. Pope Pius XI condemns eugenic sterilization.

> Finally, that pernicious practice must be condemned which closely touches upon the natural right of man to enter matrimony but affects also in a real way the welfare of the offspring. For there are some who ever-solicitous for the cause of eugenics, not only give salutary counsel for more certainly procuring the strength and health of the future child—which indeed, is not contrary to right reason—but put eugenics before aims of a higher order, and by public authority wish to prevent from marrying all those whom, even though naturally fit for marriage, they consider, according to the norms and conjectures of their investigations, would, through hereditary transmission, bring forth defective offspring. And more, they wish to legislate to deprive these of that natural faculty by medical action despite their unwillingness; and this they do not propose as an infliction of grave punishment under the authority of the State for a crime committed, nor to prevent future crimes by guilty persons, but against every right and good they wish the civil authority to arrogate to itself a power over a faculty which it never had and can never legitimately possess.

[164] *American Jurisprudence,* Vol. 15, p. 180.

> Public magistrates have no direct power over the bodies of their subjects; therefore, where no crime has taken place and there is no cause present for grave punishment, they can never directly harm, or tamper with the integrity of the body, either for reasons of eugenics or for any other reason. St. Thomas teaches this when, inquiring whether human judges for the sake of preventing future evils can inflict punishment, he admits that the power indeed exists as regards certain other forms of evil, but justly and properly denies it as regards the maiming of the body. "No one who is guiltless may be punished by a human tribunal either by flogging to death, or mutilation, or by beating."[165]

The Holy Office also condemned eugenic sterilization in a decree dated March 19, 1931. The question was asked:

> What is to be thought of the so-called "Eugenic" theory, whether "positive" or "negative," and of the means which it proposes for the improvement of human progeny, in disregard of the laws, natural, divine, or ecclesiastical, pertaining to marriage and the rights of individuals? Reply. That theory is to be absolutely disapproved and condemned, as is declared in the Encyclical on Christian Marriage, *Casti Connubii*, of 31 Dec., 1930.
>
> The above reply was entirely approved and confirmed by His Holiness, Pius XI, in the audience of 19 March, 1931.[166]

As was mentioned before, in 1940 the Holy Office condemned direct sterilization as illicit and contrary to the law of nature. It is certain that eugenic sterilization is included in this condemnation.[167]

Father Joseph B. Lehane in writing a conclusion to his dissertation on *The Morality of Eugenical Sterilization* sums up very well the Catholic position and reasoning regarding eugenical sterilization. After showing that an aura of doubt surrounds the scientific findings, theories and conclu-

[165] Pope Pius XI, *Casti Connubii*, *op. cit.*, p. 96-97.

[166] Bouscaren, *Canon Law Digest*, I, p. 677-678; *AAS* 23 (April 1931), 118.

[167] Cf. *supra*, note 161.

sions of natural science upon which the arguments for sterilization rest, Father Lehane goes on to insist that the moral law must be used as a criterion to give final judgment on the eugenic sterilization principle. He says and we quote at length:

> For Catholics the question has been decided by the consensus of the opinion of theologians speaking with the Church as well as the statements of the Supreme Pontiff and the decisions of the Holy Office. These have concluded that the State has not the power to impose sterilization on its subjects for eugenic reasons and that there is no place under the moral law for such usurpation of authority on the part of civil legislators.
>
> The arguments put forward by theologians in arriving at a conclusion denying to the State the power to sterilize may be summarized in the following fashion: The power of the State over the particular rights and actions of its individual subjects has the purpose of maintaining a ruling and governing authority within the State itself and the safeguarding of the existence and well-being of society as a whole; and hence this power is of such a nature that it can be exercised under all circumstances and at all times.
>
> But the maintenance of a ruling and governing authority within the State as well as the safeguarding of the existence and well-being of society as a whole are compatible with the presence of unsterilized mental defectives and degenerate criminals within the State; while, on the other hand, that good which may possibly be obtained by vasectomy is limited and, if necessary, is only accidentally so. The rights, moreover, of non-criminal citizens are not subject to State interference in the manner implied in legal eugenical sterilization. It has been seen that their right to bodily integrity may not be violated by the State except in the case of the implied renunciation of human dignity by persons guilty of serious crime. The person exists logically before the State and, in the absence of fault, cannot be declared to have forfeited his personal rights and privileges. The function of just law in its rela-

> tion to nonculpable groups of persons in the community is to protect the personal rights they enjoy, not to take steps toward their abolition. Hence the State in sanctioning the sterilization of citizens for eugenical reasons has exceeded the limits of its authority. State sterilization of the unfit is thus unlawful.[168]

At this present time twenty-eight states of the Union have either compulsory or voluntary sterilization laws on their statute books.[169] These laws in general provide for the sterilization of the insane, idiots, imbeciles, feebleminded, epileptics, habitual criminals, moral degenerates, etc., who are inmates of state institutions, and some who are not, upon the medical findings and recommendation of certain public authorities. These laws stand condemned both because of the doubtful scientific basis upon which they rest[170] and because they offend against the natural rights of man. The state never has the right to punish an innocent person or to take away his natural human rights. These laws are an usurpation of power on the part of the state. Laws permitting or commanding either voluntary or compulsory eugenical sterilization are opposed to the natural law and are intrinsically evil. They are unjust laws.

Applying to these laws the principles laid down by the Holy Father, we see first of all that they are unjust laws, intrinsically evil because opposed to the law of God and the Church. They are opposed to the positive law of God "Thou shalt not kill" under which as a corollary comes unnecessary mutilation. They are in opposition to God's law expressed

[168] Lehane, *op. cit.*, pp. 101-102.

[169] *Ibid.*, p. 28; also Rev. Edgar Schmiedeler, O.S.B. *Sterilization in the United States*, (Washington, D.C.: National Catholic Welfare Conference), 1943, introduction. The state of Washington repealed its sterilization law on March 17, 1947. Cf. Washington Statutes, 1947. § 167.

[170] Cf. Abraham Myerson, "Certain Medical and Legal Phases of Eugenic Sterilization," 52 *Yale Law Journal* (1943) 618-32; Walter W. Cook, "Eugenics or Euthenics," 37 *Illinois Law Review* 287-332; *Report of Commission of American Medical Association for Investigation of Eugenical Sterilization* (1936), pp. 177-83.

in man's natural rights and the inviolability of the human person. They contravene the judgment of the Church interpreting the divine law.

In some of the states provision is made for bringing sterilization cases before the court for a compulsory hearing when permission for the operation cannot be gotten.[171] There is always too the possibility of a case coming before the court testing the constitutionality of such a sterilization law. The judge in such cases cannot throw responsibility from his shoulders, nor can he render a decision obliging a person to commit an act intrinsically evil. Therefore, the Catholic judge can never in his judicial action render a decision putting the law of eugenical sterilization into effect. Rather than do so he would be obliged to give up his office. As Father Connell puts it:

> . . . In those states which now prescribe or permit eugenic sterilization for certain types of defectives and criminals, no circumstances can justify a judge in giving a decision that the law should be put into operation. Such acts, even when performed under the direction of civil legislation, contain formal cooperation in a grave transgression of the law of God. But a judge could commit a person to an institution, even though he foresees that sterilization will there be inflicted, if no other course is legally available—for example, if the person has committed a crime for which the law prescribes commitment to this institution.[172]

Should a Catholic judge, therefore, apply such a law and command that eugenic sterilization be performed, he becomes a formal cooperator in commanding an intrinsically evil action. He sins gravely against legal justice in not properly fulfilling his office and against the virtue of commutative justice and the fifth commandment in inflicting harm upon the person affected by the operation.

According to the last part of the above quotation the judge may by his decision, if the law so requires and no

[171] E.g., Oregon and Idaho. Cf. Lehane, *op. cit.*, pp. 22 and 25.
[172] Connell, *op. cit.*, p. 33.

other legal course of action is available, commit a person to an institution even though he foresees that sterilization will there be inflicted. The judge is permitted thus to act according to the principle of the double effect and mediate material cooperation. Committing the person to an institution is a licit action in itself and has the good effect of fulfilling the law, but the bad effect of exposing the person to a sterilizing operation. If the judge intends only the good effect, merely permits the bad effect, and has a proportionally grave reason for allowing the evil effect to follow, then the commitment is permissible. In this case the judge is only a mediate material cooperator in the evil done. He does not by his decision command the intrinsically evil act of eugenic sterilization. He commands according to the law that the person involved enter an institution. The evil, it is clearly seen, is only permitted, and the judge is considered to have a sufficiently grave reason for so acting—the preservation of an honest judiciary and the possible loss of office if he should refuse to act according to the law.

2. The Judge and Possible Euthanasia Laws

Legislation permitting or commanding euthanasia, or mercy killing, the "termination of human life by painless means for the purpose of ending severe physical suffering,"[173] has not been passed in the United States. We most sincerely hope that it never will be. But there is the possibility. Attempts have been made in that direction in the past, are being made today and will be made. In 1937 State Senator John H. Comstock, now a member of the Advisory Council of the Euthanasia Society of America, Inc., introduced into the Nebraska Assembly his own bill for legalized voluntary euthanasia. However, the bill was never submitted to a vote.[174] The Euthanasia Society of America organized in New York City in 1938 has been carrying on

[173] Joseph V. Sullivan, *Catholic Teaching on the Morality of Euthanasia*, (Washington, D.C.: The Catholic University of America Press, 1949), p. 25.

[174] *Ibid.*, p. 22.

a persistent campaign to gain interest and favor for the quiet and quick release of those who suffer from incurable, fatal and painful diseases and have the desire to end their life. This Society has succeeded in gaining for its movement the support of a number of nationally known persons including such names as: Max Eastman, Fannie Hurst, Robert Sherwood, Eugene O'Neill, Margaret Sanger, and clergymen, Dr. Harry Emerson Fosdick and Dr. Ralph W. Sockman.[175] A number of other New York clergymen have signed a statement favoring mercy killing, maintaining that they see no ethical wrong in this manner of taking life.[176] A large number of physicians are known to favor euthanasia. The Euthanasia Society itself has prepared a bill which the members hope to introduce into the New York State Assembly as soon as it can be done. This bill would legalize voluntary euthanasia.[177]

The concentrated effort now being made to gain prestige for the movement, together with the pagan ideals, thought and practices of our time, make the future legalization of euthanasia a definite possibility. Should a bill of the type proposed by the Euthanasia Society ever be passed, the judge would find himself faced with a very definite moral problem since the proposed bill provides that the granting of a petitioner's request for euthanasia be under the jurisdiction of the courts. Section 302 of Article 15 of the proposed bill reads as follows:

> Sec. 302. JURISDICTION OF COURTS. Any justice of the Supreme Court of the judicial district, in which the patient resides or may be, or any other judge of a county court of any county in

[175] *Ibid.*, pp. 20-21; Cf. also Robert F. Drinan, S.J., "Euthanasia: An Emergent Danger," *The Homiletic and Pastoral Review*, (Dec. 1949), pp. 220-23; T. O. Martin, "Euthanasia and Modern Morality," 10 *The Jurist* (October 1950) 437-64.

[176] "Statement on the Ethical Aspects of Euthanasia by Fifty Religious Leaders of New York State," Euthanasia Society, January 1947, Mimeographed; also Sullivan, *Ibid.*, p. 20.

[177] Cf. Sullivan, *op. cit.*, pp. 25-28, for the text of the proposed bill to legalize euthanasia.

> which the patient resides or may be, to whom a petition for euthanasia is presented, shall have jurisdiction of and shall grant euthanasia upon the conditions and in conformity with the provisions of this article.[178]

Other provisions of this proposed bill are as follows: Any person of sound mind over twenty-one years of age who is suffering from severe physical pain caused by a disease for which no remedy affording lasting relief or recovery is at the time known to medical science may address to the court a petition for euthanasia. This petition must be signed by the petitioner himself and two witnesses and be accompanied by a certificate from the patient's attending physician attesting that the disease, in his opinion, is incurable and that the patient understands the nature of his petition. Having received the petition the judge appoints a committee of three persons, two of whom are physicians, who examine the patient and within five days of their appointment report to the court whether or not the patient understands the nature and purpose of his petition and whether he is suffering from an incurable disease. The court is then given three days to grant or deny the petition. If an affirmative report is made by the committee, the court, if it believes the report correct and true, is to grant the petition and euthanasia is to be administered.[179]

As to the morality of euthanasia, whether it be voluntary or compulsory, the answer is that it is totally contrary to the law of God. It is intrinsically evil directly to take the life of an innocent person. Euthanasia is directly opposed to God's commandment "Thou shalt not kill." Now it is admitted, of course, in the interpretation of the Fifth Commandment that man can protect his own life in self-defense even to the extent of taking the life of the unjust agressor if necessary, that man can take another's life in the waging of a just war, and that the state has the right to inflict death as a punishment for serious crime. But no valid interpreta-

[178] *Ibid.*, p. 26.
[179] *Ibid.*, pp. 23-28.

tion of the Fifth Commandment can ever be made which permits the state or anyone else to commit murder by the direct taking of the life of an innocent person. God has given life to man as a sacred gift with the dominion of proper use. God reserves to himself the supreme dominion.

> So sacred is human life that no public authority, no private person, can for any reason directly kill an innocent man.
>
> There is a profound significance in the fact that this fundamental truth is so seriously challenged today; challenged, you understand, not in a classroom or a letter to the editor, but in the concrete actions of governments and men. Such a challenge is the execution of hostages as means of holding off the enemy, or the killing of an innocent but influential person whose death has been demanded by the military authority of the enemy: all this in the name of the common good. On the personal side there is the mercy killing calculated to relieve a man of his suffering; the painless killing of the hopelessly wounded, of the old, the misfit, the insane, social nuisances. The argument even includes an unborn child that the mother's life be saved. All this is murder. The smooth, somniferous length of the words we use to describe it—liquidation, euthanasia, mercy killing, solicitude for suffering mothers—does not destroy the ugliness of murder.
>
> Murder is its hideous, loathsome self no matter what name we give it. Society can kill in self-defense. But surely the man who violates no rights is not attacking society, nor is he an unjust agressor threatening the life or property of an individual citizen. He is innocent and his life is sacred.[180]

Besides showing that euthanasia is intrinsically evil because it is contrary to the natural law, that it is opposed to the teaching of the Old and New Testaments, and that it is contrary to man's natural desire to live, Father Sullivan, in his dissertation on the morality of euthanasia, also shows

[180] Walter Farrell, O.P., *A Companion to the Summa*, (New York: Sheed & Ward, 1945), III, pp. 199-200.

its evil effects from the "wedge principle"—that once it gets started, one can't tell where it will stop.

> Nevertheless, euthanasia must not be administered, for to permit in a single instance the direct killing of an innocent person, would be to admit a most dangerous wedge that might eventually put all life in a precarious condition. Once a man is permitted on his own authority to kill an innocent person directly, there is no way of stopping the advancement of that wedge. There exists no longer any rational grounds for saying that the wedge can advance so far and no farther. Once the exception has been admitted it is too late; hence the grave reason why no exception may be allowed. That is why euthanasia under any circumstance must be condemned. We are making use of this as a secondary argument; for the primary argument is found in the intrinsic malice of the direct killing of an innocent person. but even one who would not admit this should acknowledge the value of the present argument.[181]

Voluntary euthanasia is intrinsically evil since it is opposed to God's law. But the euthanasia enthusiasts do not intend to stop at voluntary euthanasia; it is to be used only as a stepping stone to the compulsory kind.[182] Of this Father Sullivan says:

> If voluntary euthanasia were legalized, there is good reason to believe that at a later date another bill for compulsory euthanasia would be legalized. Once the respect for human life is so low that an innocent person may be killed directly even at his own request, compulsory euthanasia will necessarily be very near. This could lead easily to killing all incurable charity patients, the aged who are a public care, wounded soldiers, captured enemy soldiers, all deformed children, the mentally afflicted, etc. Before long the danger would be at the door of every citizen.[183]

If in the future euthanasia is legalized the judge may very

[181] Sullivan, *op. cit.*, p. 55.

[182] G. J. Gustafson, "379 Against God," 47 *Catholic Mind* 556-57 (Sept. 1949).

[183] Sullivan, *op. cit.*, p. 55-56.

well be confronted with the problem of its enforcement. According to the principles of Pius XII the duty of the Catholic judge is clear. He can have no active part in the enforcement of this intrinsically evil law. The judge may be acting only as a "rubber stamp." He may be granting a petition which the law demands he must grant if the law's conditions are fulfilled. Nevertheless, he may not put his signature upon a petition or order requesting or commanding euthanasia. Responsibility rests upon his shoulders and if by his action he puts the law into effect he becomes a formal cooperator in the intrinsic malice of mercy murder. Even though the judge does not associate himself with the evil content of the law and does not therefore will the death of the innocent person, his action of commanding the law to take its course amounts to formal cooperation in the evil done, for the judge by his action commands an act in itself intrinsically bad,—opposed to the law of God and the Church—the killing of an innocent person.

Father Sullivan contemplates the case of a judge granting permission for a mercy killing.

> Judge Brown, in line with his office as judge, grants permission for a mercy killing when the legal requirements for the permit have been fulfilled. He asserts that in view of the enacted law he is compelled to grant euthanasia when the commission favors it. Hence he claims no responsibility for the mercy death. He believes also that morally speaking the case is similar to the judge granting a divorce.
>
> Judge Brown may not grant euthanasia even at the cost of disobeying civil law or of resigning from his position as judge. By granting euthanasia he has become a formal cooperator in murder. It makes no difference whether that person is healthy or sick, or even requests euthanasia, the fact remains that the person is innocent and the judge may not send an innocent person to death.... Judge Brown is also confused concerning the similarity between divorce and euthanasia. A divorce is not intrinsically evil; it is remarriage after di-

> vorce that is *in se evil.* In a divorce case the judge merely makes an official declaration that the state regards the civil effects of marriage as no longer existing.[184]

And Father Connell writing of the judge and euthanasia says:

> The case is very different if a judge is called on to give a decision in favor of an action that is intrinsically wrong. Thus, in the years to come—particularly if we shall have on our hands a large number of persons physically and mentally incapacitated as a result of war—the advocates of euthanasia may succeed in legalizing "mercy killing." Of course, law or no law, a judge would never be allowed to approve or decree such an act of murder.[185]

Should in the future an euthanasia law be passed and should the judge, despite the evil of it, cooperate in effecting the mercy killings by permitting or ordering the law to take its course, he sins against legal justice in improperly fulfilling his office and against the Fifth Commandment in permitting or directing murder. Both sins are mortal and the latter has the species of murder.

3. The Judge and Contraceptive Laws

Knowing the moral and social evil that can come to a nation should men and women of depraved minds and questionable morals be permitted to flood a country with all sorts of obscene and immoral literature, the federal government passed laws in 1873 forbidding the mailing of obscene and crime-inciting matter, and the importation and interstate transportation of obscene literature. These laws in substantially the same form are still on the statute books in the present penal code of the United States.[186] Included in the laws as obscene matter and literature are articles which are designed, adapted, or intended for preventing conception; articles which are advertised in a manner calculated to

[184] Sullivan, *op. cit.*, pp. 67-68.
[185] Connell, *op. cit.*, p. 33.
[186] *United States Code*, Title 18, § 1461, § 1462.

lead another to use or apply them for preventing conception; or any writing giving information how or by what means conception may be prevented. The mailing, the importation, and the interstate transportation of the above mentioned contraceptive devices and information are therefore prohibited.

When birth control organizations led by Margaret Sanger began their attempts to instruct the nation in preventive methods in 1914, they found that their publication was in violation of the federal laws. In a number of cases the law was defied and birth control information was sent through the mails despite the law. In some instances the violators were caught, convicted and punished.[187] Attempts were also made to introduce legislation into the United States Congress to change the postal laws, but all these efforts were unsuccessful. The laws were interpreted strictly and literally and enforced in the same manner, and there seemed to be no desire on the part of Congress to change them.[188]

It was in the courts that the law was changed. In 1930 in the case of Youngs Rubber Co., Inc., v. C. I. Lee & Co., Inc., the court, although not deciding this point, in its opinion set aside the literal interpretation of the laws and their application to contraceptive devices.[189] The law taken literally, the court said, would seem to forbid the mailing or shipping of any article which was "adapted," that is, which could be used for contraceptive purposes, even though that article might also have a legitimate use. Obviously, the court reasoned, Congress did not intend to prevent the proper use of these articles merely because they could be used for evil purposes. Hence the court discarded the literal interpretation and ruled in effect that such things could be mailed and shipped provided they were intended for legitimate purposes. "Legitimate purposes," of course, admitted of a very broad

[187] Edgar Schmiedeler, O.S.B., *25 Years of Uncontrol*, (Huntington, Ind., Our Sunday Visitor Press, 1943), pp. 61-65, 72.

[188] *Ibid.*, pp. 66-70.

[189] C.C.A., Second Circuit, (Dec. 15, 1930), 45 F. 2nd 108.

interpretation for those who were not inclined to recognize a definite moral standard.

In another case in 1933 a like opinion was handed down in which the opinion in the above Youngs-Lee case was quoted. Here it was held that in order to secure a conviction in accordance with the postal law, it was necessary to prove that the person mailing the contraceptive information intended the article described therein should be used for condemned purposes.[190] This undoubtedly is very hard to prove in this case since the evil intent is internal, and since some legitimate uses are said to exist, the sender can always claim he has mailed them for these legitimate purposes.

There was cause for great rejoicing in the birth control camps when in the case of United States v. One Package in 1936 the Second Circuit Court of Appeals in its opinion given by Judge Augustus N. Hand maintained that the design of Congress "was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients."[191] All a doctor had to say now was that contraceptive information and devices were given for the "well-being" of their patients and the law was fulfilled. One must admit that "well being" offers lots of latitude.

The same Second Circuit Court of Appeals in 1938 decided that the sending through the mails of contraceptive articles or publications is not forbidden absolutely, but only when such articles or publications are unlawfully employed.[192] Which really makes the law in regard to contraceptives no law at all. Who is to say in a pagan world when such devices are unlawfully employed? We find the law in the anomalous position of saying such things are forbidden

[190] Davis v. U.S., C.C.A., Sixth Circuit, (Jan. 10, 1933), 62 F. 2nd 475.

[191] C.C.A., Second Circuit, (Dec. 7, 1936), 86 F. 2nd 729.

[192] U.S. v. Nicholas, C.C.A., Second Circuit, (June 13, 1938), 97 F. 2nd 511, 512.

when they are unlawful, but they are practically never unlawful.

While one might agree with the opinion of the court (and it seems to be medically true) that most of the articles used as contraceptives could have possibly another and also a legitimate use, yet it cannot be doubted that their primary and almost sole purpose is to prevent conception, an action intrinsically evil in its nature and opposed to God's law. Nor, can their use be defended as a disease-preventive measure, as is so often attempted. In this latter instance the devices have the additional effect of encouraging adultery and illicit relations among the unmarried by offering a minimum possibility of disease as well as of conception. Abstention from illicit relations is the moral protection against venereal disease. It is inconceiveable that the great amount of information and the great number of articles and instruments that are manufactured and distributed with such abandon are intended or used for legitimate, lawful purposes. The court would have done better if it had made clear in the light of God's law the limited lawful purposes to which these devices and instruments could be put, rather than discard the law entirely by leaving the question of lawful use to a liberal-minded pagan group in society who know not God's law, and to whom all is lawful. If the court can be said rightly to interpret Congress as not wishing to hinder the lawful use of these devices, it is wrong in handing down a decision making the interpretation possible that practically every use is a lawful use, thus nullifying the purpose of Congress in writing the law. One most certainly is led to question the sensibility, truth and wisdom of the courts' decisions.

The result of all this is that contraceptive devices and information have flooded the country with resultant moral decay of youth and with utter disregard for the sacred purpose and sanctity of the married life. The federal law is still on the statute books but it is as if it were not. The campaigns of the birth control advocates have had their success. The words "birth control" together with a few others have be-

come a kind of oft repeated paganistic cure-all answer to the social ills of our time. But ought we not to know that instead of curing it is only adding more ills to those we have? No nation ever flaunts God's laws with impunity.

Taking up where the federal government is now lacking, thirty-one of the states have laws either prohibiting or regulating the dissemination of contraceptive devices and information, while seventeen states have no law at all.[193] In view of the freedom with which such devices are distributed in those states which have no law, it seems that when a prohibitory law is impossible to pass, a regulating law is desirable as the lesser of two evils. Yet even the regulatory law has the effect of giving legal recognition and respectibility to an intrinsically evil trade.

Concerning the moral evil of birth control, Pope Pius XI in *Casti Connubii* states clearly the Catholic teaching. We quote at length.

> And now, Venerable Brethren, We shall explain in detail the evils opposed to each of the benefits of matrimony. First consideration is due to the offspring, which many have the boldness to call the disagreeable burden of matrimony and which they say is to be carefully avoided by married people not through virtuous continence (which Christian law permits in matrimony when both parties consent) but by frustrating the marriage act. Some justify this criminal abuse on the ground that they are weary of children and wish to gratify their desires without their consequent burden. Others say that they cannot on the one hand remain continent nor on the other can they have children because of the difficulties whether on the part of the mother or on the part of family circumstances.
>
> But no reason, however grave, may be put forward by which anything intrinsically against nature may become conformable to nature and morally good. Since, therefore, the conjugal act is destined

[193] Vincent C. Allred, Unpublished compilation of contraceptive laws in the United States, National Catholic Welfare Conference, Washington, D.C., January 1950.

> primarily by nature for the begetting of children, those who in exercising it deliberately frustrate its natural power and purpose sin against nature and commit a deed shameful and intrinsically vicious.
>
> Small wonder, therefore, if Holy Writ bears witness that the Divine Majesty regards with greatest detestation this horrible crime and at times has punished it with death. As St. Augustine notes, "Intercourse even with one's legitimate wife is unlawful and wicked where the conception of the offspring is prevented. Onan, the son of Juda, did this and the Lord killed him for it."[194]
>
> Since, therefore, openly departing from the uninterrupted Christian tradition some recently have judged it possible solemnly to declare another doctrine regarding this question, the Catholic Church, to whom God has entrusted the defense of the integrity and purity of morals, standing erect in the midst of the moral ruin which surrounds her, in order that she may preserve the chastity of the nuptial union from being defiled by this foul stain, raises her voice in token of her divine ambassadorship and through Our mouth proclaims anew: any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offense against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin.[195]

We see therefore in this clear statement of Pius XI that it is directly opposed to the law of God and of nature for husband and wife so to use the conjugal act as to frustrate deliberately its natural power and purpose to generate life. Pope Pius XI is here not teaching a doctrine merely ecclesiastical binding Catholics only, but as the protector and teacher of correct morals is making clear what binds all people since it is the teaching of the natural law itself. Those

[194] "Illicite namque et turpiter etiam cum legitima uxore concumbitur, ubi prolis conceptio devitatur. Quod faciebat Onan filius Judae, et occidit illum propter hoc Deus." St. Augustine, *De conjugiis adulterinis*, PL 40, 479; Genesis 38, 8-10.

[195] Pope Pius XL, *Casti Connubii, op. cit.*, pp. 92-93.

who advocate and promote and make possible by legislation the dissemination of contraceptive information and devices, who manufacture and sell such devices for contraceptive purposes are cooperating in a program that is intrinsically evil.

Civil government is not fulfilling its duty to protect its citizens from grave moral evil if it does not take measures to prohibit the dissemination of immoral birth control devices and information. In its law of 1873 the federal government did its duty in this respect. Since 1930, however, court decisions have made the federal law ineffective. Therefore legislators have the duty to enact a new law which would admit of no equivocal interpretation. States too have the duty to enact such laws and to prosecute those who break them. Never is it permitted to the state to foster through public funds, as has been and is being done, an immoral birth prevention program.[196]

In fulfilling the duties of his court the judge may be called upon to preside over cases dealing with the vice of contraception. He may be thus required to judge in a civil suit involving a matter of justice between companies or persons engaged in the buying and selling of contraceptives. In those states where such transactions are permitted by law the judge is permitted to award the decision according to the rules of justice applicable in the case. In doing so he is a cooperator in the promotion of such businesses, but his cooperation is only material and is sufficiently remote to permit his giving a judgment.[197]

The federal judge may be faced with a case involving an interpretation of the present federal law relating to the prevention of conception. Since this law is just and good, the judge is held to interpret it according to its true meaning.

[196] Don Wharton, "Birth Control: The Case for the State," *Atlantic Monthly*, October, 1939, pp. 463-467; George M. Cooper. "The Possibilities of a Statewide Program on Abortion Control," in *The Abortion Problem*, (Baltimore: The Williams & Wilkens Co.), 1944, pp. 167-168.

[197] Connell, *op. cit.*, p. 38.

The obvious meaning of the federal law when enacted was to keep contraceptive devices and information from flooding the country and working grave harm to youth and the family. That is its true meaning today. Court decisions since 1930, however, have in effect set aside this true meaning. These decisions are correct in saying Congress did not intend to hinder the legitimate and lawful use of devices adapted to contraception. But these decisions err in making in effect every use a legitimate use, thereby setting aside the obvious meaning of the law and defeating its purpose. The result is that contraceptives today are working the harm the Congress of 1873 foresaw they would. If today a Catholic judge were faced with such a case he would be held to interpret the law so that in effect its obvious meaning would be attained and the nation-wide immoral use of contraceptives be thwarted. This he could do by interpreting the law literally and strictly or by deciding to what legitimate uses these devices could be put. An examination of the law itself shows that it permits either interpretation. Should the judge, therefore, interpret it otherwise, that is, according to the previous court decisions,[198] he sins in not properly fulfilling his office and cooperates in the furthering in society of a great moral evil opposed to the law of God and nature. The judge's action is proximate material cooperation in the resulting sins, for which he here in this case has and can have no justifying reason since the law itself admits of a moral interpretation.

In states which have laws prohibiting the sale of contraceptive devices and the giving of birth control information, the judge should strive to protect the law against the numerous subterfuges of the protagonists of planned parenthood.[199] As in the case of the federal law, here likewise the judge is held to interpret the prohibitive law in such a way that birth

[198] The celebrated mode of action "Stare decisis" does not bind when previous decisions are erroneous in principle. Cf. Editorial in 34 *American Bar Association Journal*, pp. 919-20. There have been sound reversals.

[199] Connell, *op. cit.*, p. 33.

control devices and information shall not be distributed for immoral purposes, if such an interpretation can be given the law. If the law admits only of an interpretation which would in effect permit the widespread distribution of birth control devices and information, to be used without doubt for immoral contraceptive purposes, the judge must then apply the principles of material cooperation in the evil of others. If the judge gives judgment according to the law, he would seem to be cooperating proximately and materially in evil actions, for by his judgment contraception is permitted to flourish with great ensuing harm to youth and the family. Such a judgment gives legal encouragement to actions opposed to the law of God and nature.

According to the principles of material cooperation in this case, the judge is permitted by his decision in accordance with the law to permit the evil of sins committed through the use of contraceptive devices if he has a sufficiently weighty reason for so acting. If the reasons which would prompt a judge to decide according to the law, that is, freedom from public criticism and abuse, the retention of his office, the preservation of an honest judiciary, are not thought weighty enough to overbalance the tremendous harm done through the moral degradation of youth and the family resulting from the widespread use of contraceptives, then the Catholic judge would not be permitted to give an interpretation according to the law, and would be obliged to resign his office rather than do so. On the contrary, given a case and instance wherein the good resulting from his judging according to the law is greater than the evil done, and therefore the reasons for acting are sufficiently weighty, then he would be permitted to give a decision or interpretation according to the demands of the law, for example, when the preservation of an honest judiciary is thought to be of more importance than whatever evil will be done as a result of the judge's decision. We must remember that here we are dealing with material cooperation only and not with formal cooperation.

Not wishing or being able to pass a law prohibiting altogether the sale of contraceptives and the distribution of birth control information, some of the states have passed laws regulating their advertisement and distribution. These laws have the good effect at least of restricting the sale and advertisement of contraceptives and are regarded as the lesser of two evils and may be permitted. In states where these regulating laws are in existence the judge may be asked to punish violators of the law. This he may do, according such punishments as the law permits or directs.

The judge may also be called upon to settle certain civil suits regarding these regulating laws. For example, a person who has been denied a license for the sale of contraceptive devices may file suit to secure a license and the court may be asked to decide whether or not he is to be permitted to have it. If the judge can find a reason under the law to deny the man the license, he is bound in conscience to deny it. But what is the judge to do if in examining the case he finds all the requirements fulfilled for the granting of the license and no grounds on which to deny it? This case also must be decided by applying the principles of proximate material cooperation. If he grants the license the judge acts according to the law and frees himself from public abuse and criticism and runs no risk of losing his office, but he cooperates in the sins committed through the subsequent sale and use of the contraceptive devices. If the evil done is greater than the good resulting to the judge and society, then the judge cannot give decision according to the law. But if on the other hand the good foreseen as resulting to the judge and society is greater than the evil done then the judge would seem to have a sufficiently weighty reason and would be permitted to grant the petitioner his license in accordance with the law.

There are indeed a variety of cases relating to contraceptives that could come before the judge. The judge should diligently study all the relevant factors and apply to each case the proper moral principles.

4. The Judge and Laws Opposed to a Human Good

In the division of unjust laws, besides those opposed to the divine law, positive and natural, and to the ecclesiastical law, we have laws opposed to purely human good in social living. The just law directing human good in social living must issue from proper authority and be ordered to the common good or public welfare, so that if a law exceeds authority or is ordered not to the common welfare but to the good of individuals, or if it burdens special groups excessively, it is unjust. The society in which we live today is extremely complex, requiring a vast amount of complex regulating legislation on the part of federal, state and local governments. Because of the complexity of the present social order it is oftentimes difficult for legislators to know what is the proper legislation needed to establish the necessary regulations and direction of human civil temporal affairs. Hence it becomes a difficult matter to judge in particular cases whether laws are really conducive to the common good or rather tend to favor or burden disproportionately certain individuals, groups or classes. It becomes then a difficult matter to judge whether or not particular laws are just or unjust. In order to maintain the good order of society and trust in our legislative system, the presumption in doubtful cases is that the law is a just one and to be observed. The judge accordingly will give a decision in accordance with the demands of such a law. If, however, a law supposedly directing human good in society is obviously unjust, the judge in his role as the minister of justice ought not to apply it, but he may do so if necessary to impede a much greater evil, that is, if the good order of the community demands, so that scandal or disturbance may be avoided, or should he suffer grave harm to himself and to society by refusing. In determining whether he should allow such a law to take its course or not, the Catholic judge must again apply to the specific case at hand the principles of the double effect and material cooperation.[200]

[200] Cf. *supra* p. 162.

An example in our land of what might be called an unjust law opposed to a human good insofar as it burdens a special group excessively is the legal tax arrangement whereby Catholics contribute a large amount in taxes for educational purposes but do not receive anything from these collected funds for the support of their own parochial schools which they conduct by divine and constitutional right. In reality this is a case of unproportional taxation without proportional benefits being placed upon a special group, as it were a penalty for exercising their divine and constitutional right of being interested in the spiritual development of the child.

Distributive justice demands that those who rule distribute the benefits and the burdens of a community upon its members according to their merits, capacities, and needs in the quality of due proportion. There is little doubt that distributive justice is violated and injustice is done in the disproportionate burdens without benefits Catholics are made to carry because of our educational tax laws. Since these laws are unjust, Catholics could not be held bound in conscience, in light of the demands of legal justice, to pay the excessive taxation, except in order to avoid scandal or disturbance. For these reasons and for the maintenance of good order in society Catholics have been yielding their right and observing the law,[201] with the hope, however, of better legislation in this matter.

If because of the injustice involved a particular Catholic should refuse to pay a portion of his taxes, his portion of that part set aside for schools, and as a result be brought before the court in contesting the law, the Catholic judge should do what he can to show the law's injustice and to avoid its application. If circumstances necessitate application of the law, the judge, in order to impede a much greater evil, could demand according to the law and in view of the maintenance of good order in society, that he pay his full taxes. Should the accused refuse to pay, the judge could inflict the penalty that the law provides, if it is the only means of impeding the

[201] *Summa Theologica*, II-II, q. 96, a. 4, ad 3.

much greater evil, if the penalty of its nature is acceptable, and if the judge knows or can reasonably presume that the accused is willing to accept it in order to avoid harm to the judge, the Church, and society and to preserve an honest judiciary.[202] The most mitigated penalty possible should be inflicted.

[202] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (Dec. 22, 1949), 597; *The Catholic Mind*, 48 (Jan. 1950), 57.

CHAPTER V

THE CATHOLIC JUDGE AND DIVORCE CASES

Perhaps no part of Pope Pius XII's talk to the jurists of Italy provoked more comment and caused more concern throughout the world, especially in the United States, than that part in which he spoke of the Catholic judge's handling of divorce cases. One writer over a month after the publication of the Holy Father's speech wrote: "Legal circles the world over were stirred recently when Pope Pius XII reiterated the Roman Catholic Church's adamant stand on divorce . . . But the most extensive reaction was in the United States, where many Catholics sit on judges' benches, and where divorce has increased steadily from 55,000 in 1900 to 613,000 in 1946."[1]

In order to understand fully the principles governing the Catholic judge's handling of divorce cases, it is necessary first of all to understand the Church's basic teaching on marriage and divorce, and the powers that both Church and state exercise over the sacred matrimonial contract.

A. The Church, Marriage and Divorce

The Church's teaching on the question of marriage and divorce is well known. It is simply the Christian teaching that a valid marriage is a holy, enduring, perpetual and indissoluble union, to which God is a partner, and that simply man cannot render asunder what God has joined together. God is the author of marriage and from the beginning made it indissoluble. In the beginning God created man and woman. He gave to them the power and duty of continuing the race. He united them two in one flesh. As is noted for us in the book of Genesis, "God created man to his

[1] Frank Brutto, Article in *The Courier-Journal*, a newspaper of Louisville, Kentucky, December 25, 1949, Section 3, p. 4.

own image; to the image of God he created him. Male and female he created them. And God blessed them saying: Increase and multiply and fill the earth . . . Wherefore a man shall leave father and mother and shall cleave to his wife: and they shall be two in one flesh."[2]

But as time went on the unity and perpetuity of marriage began to be corrupted by degrees and to disappear among the heathen, and to be obscured and clouded among the Jews. Among the Jews the custom was gradually introduced whereby it was accounted lawful for a man to have more than one wife. Eventually the way was laid open to divorce when Moses by reason of the power God had given to him and because of the hardness of their hearts permitted them to put away their wives.[3]

But when Christ came, he changed all this. He ennobled marriage by his presence at the marriage feast of Cana, honoring it as the occasion of his first public miracle.[4] Later he restored marriage to its pristine dignity by condemning the Jewish practice of granting bills of divorce. Christ commanded firmly that no man had the power to dissolve the perpetual bond which God had sanctioned. All this is brought forth clearly in the scene from Sacred Scripture when the Jews approached Our Lord to test him with the question, "Is it lawful for a man to put away his wife for any cause?" In his answer Christ said to them:

> "Have you not read that the Creator, from the beginning, made them male and female, and said, 'For this cause a man shall leave his father and mother, and cleave to his wife, and the two shall become one flesh'? Therefore now they are no longer two, but one flesh. What therefore God has joined together, let no man put asunder." They said to him, "Why then did Moses command to give a written notice of dismissal, and to put her

[2] *Genesis* 1, 27-28; 2, 24.

[3] *Deuteronomy* 24, 1-4; Pope Leo XIII, *Arcanum Divinae*, *ASS*, 12 (1879/80) 387; *The Great Encyclical Letters of Leo XIII*, (New York: Benziger Bros., 1903), p. 61.

[4] *John* 2, 1-11.

> away?" He said to them, "Because Moses, by reason of the hardness of your heart, permitted you to put away your wives; but it was not so from the beginning. And I say to you, that whoever puts away his wife, except for immorality, and marries another, commits adultery; and he who marries a woman who has been put away commits adultery."[5]

And previously in his Sermon on the Mount, Jesus had said:

> "It was said, moreover, 'Whoever puts away his wife, let him give her a written notice of dismissal.' But I say to you that everyone who puts away his wife, save on account of immorality, causes her to commit adultery; and he who marries a woman who has been put away commits adultery."[6]

And in St. Luke's Gospel:

> "Everyone who puts away his wife and marries another commits adultery; and he who marries a woman who has been put away from her husband commits adultery."[7]

These texts, along with other corroborative texts in the Scriptures, show firmly the divine teaching that no man or human agency has the power to dissolve the valid marriage bond.[8] The schismatic churches of the East,[9] theologians of the Protestant Revolt[10] and non-Catholic theologians of the present day[11] have interpreted the Scriptures as permitting divorce on the grounds of adultery or immorali-

[5] *Matthew* 19, 3-12. [6] *Matthew* 5, 32. [7] *Luke* 16, 18.

[8] Cf. *Mark* 10, 11; *Romans* 7, 2; *1 Corinthinas* 7, 10-11; 7, 39.

[9] Donald Attwater, *The Christian Churches of the East*, (Milwaukee: Bruce Publishing Co., 1948), Vol. 2, p. 163; Merkelbach, *op. cit.*, III, n. 815.

[10] Martin Luther, *The Babylonian Captivity*, Chapter on Matrimony, cf. *Works of Martin Luther* (Philadelphia: A. J. Holman Co., 1915), Vol. II, p. 271; John Calvin, *Institutes of the Christian Religion* (Philadelphia: Presbyterian Board of Publication, 1902), Vol. II, p. 632.

[11] P. J. Gannon, "The Teaching of Christ on Divorce," *The Irish Ecclesiastical Record*, Vol. 28 (July 1926), pp. 1-18; Cf. page 9 for views of some Anglicans that adultery is a cause for divorce; G. H. Joyce, S.J., *Christian Marriage*, (London: Sheed & Ward, 1948), pp. 409-28.

ty. In the course of the centuries much has been written in discussion of the texts of St. Matthew, but a critical examination of the texts themselves, their comparison with other texts, and the constant and firm teaching of the Church declare that such an interpretation is erroneous.[12] An accepted and tenable interpretation of these texts declares that unfaithfulness is sufficient justification for separation, but is not a cause for the breaking of the marriage bond.[13]

Another tenable explanation of the texts of St. Matthew holds that the words "save on account of immorality" (5,32) and "except for immorality" (19,9) have not been clearly rendered in the English version and that following a strict analysis of the Greek text the first should read "outside the question of adultery" or "prescinding from the question of adultery" or "fornication," and the second "not (doing it) for adultery." In these words Our Lord was referring to the Hillel-Shammai controversy over the question of Jewish divorce, a matter much discussed at that time. In this controversy the Hillel school of thought gave a wide interpretation to Moses' permission of divorce and held that divorce could be granted for almost any reason; whereas the Shammai school insisted that divorces could be granted only in cases of adultery or immorality. The Jews to whom Our Lord spoke on both occasions were well aware of the controversy, and would expect him to consider it in speaking of divorce. The Pharisees themselves expressly brought up the discussion in their test question, "Is it lawful for a man to put away his wife *for any cause?*" —which, in truth, is the Hillel position. In view of a clearer rendering of the Greek and in view of the controversy of the time, the explanation here spoken of maintains that the words of Matthew 5,32 make complete sense if they should read: "But I say to you that everyone who puts away his wife—putting aside the question of adultery (that is, put-

[12] John Pitrus, *The Problem of Divorce*, (Fribourg, 1934), pp. 49ff; F. E. Gigot, *Christ's Teaching Concerning Divorce*, (New York: Benziger Bros., 1912).

[13] Gannon, *op. cit.*; Also *Codex Juris Canonici*, Canon 1129.

ting aside the Hillel Shammai controversy, which I do not consider to the point)—causes her to commit adultery; and he who marries a woman who has been put away commits adultery." With this reading, St. Matthew, instead of making exception, proclaims the absolute indissolubility of Christian marriage.[14] In his words, therefore, in the Sermon on the Mount, Our Lord was neither permitting divorce nor separation because of adultery or immorality, but was declaring that he was not taking into consideration as at all relevant the Hillel-Shammai controversy. Hence he was abrogating divorce altogether and strongly proclaiming the absolute indissolubility of the Christian marriage bond.

This opinion also maintains that Matthew 19,9 is a direct answer rejecting the view of Hillel and should read, "I say to you, that whosoever shall put away his wife, not (doing it) for adultery, (but doing it for any other cause) and shall marry another comitteth adultery." This is equivalent to saying that if a man puts away his wife in accordance with the teaching of Hillel for almost any cause as opposed to that of Shammai, he commits adultery. It can be seen, therefore, that in Matthew 19,9 in the words "not (doing it) for adultery," Christ is referring to and rejecting the Hillel teaching, and that here he does not really refer to Christian marriage. He merely answers negatively the question which amounts to "Is Hillel's teaching on divorce right?" At the same time, however, he states the true Christian teaching of the indissolubility of the marriage bond. Such an interpretation is in complete agreement with the other texts of Sacred Scripture referring to divorce in the New Law.[15]

So sacred and important, then, did God consider the valid marriage bond that he withheld it altogether from the power of human authority, declaring "Let no man put asunder what God has joined together." In addition Christ bestowed

[14] For a full discussion of this explanation see Vincent P. Hanley, "The Indissolubility of Christian Marriage," *The Irish Ecclesiastical Record*, Vol. 27, (Feb. 1926), pp. 148-177; Cf. also E. LeCamus, *The Life of Christ*, (St. Paul: Catechetical Guild, 1945) Vol. II, pp. 487-99.

[15] *Mark* 10, 1-12; Cf. *supra* Note 8.

an even greater nobility, strength and firmness upon the matrimonial bond of Christian marriages, raising them to the dignity of a sacrament and comparing the union of husband and wife in a Christian marriage with the inestimable union of Christ with his Church.[16] The Council of Trent declares definitively that Christian marriage is one of the seven sacraments,[17] and Pope Leo XIII speaks of the marriages of Christians as "far the noblest of all matrimonial unions."[18] Pope Pius XI points out that when these unions are valid and consummated not even the power of the Church extends to their dissolution.

> However, not even this power (of the Church) can ever affect for any cause whatsoever a Christian marriage which is valid and has been consummated, for as it is plain that here the marriage contract has its full completion, so, by the will of God, there is also the greatest firmness and indissolubility which may not be destroyed by any human authority.[19]

It is seen, therefore, that from the very beginning the marriage contract was always regarded as begetting a firm, perpetual and indissoluble bond. It is true that God, by his divine power and as the author of marriage, did for a time permit divorce to the Jews because of their hard hearts. But it was not always so. And Christ by his divine power restored marriage to its former status. It is true also that in the Christian dispensation the valid marriages of unbaptized persons may be dissolved in view of the Pauline Privilege, and that valid marriages between baptized and unbaptized persons may be severed in favor of the faith under certain circumstances, and that a sacramental marriage, *ra-*

[16] *Ephesians* 5, 25-33; *Codex Juris Canonici*, Canon 1013, 2.

[17] Council of Trent, Session XXIV; Denzinger, *Enchiridion Symbolorum*, 969, 971.

[18] Pope Leo XIII, *Arcanum Divinae*, *ASS*, 12 (1879/80) 389; *The Great Encyclical Letters of Leo XIII*, p. 68.

[19] Pope Pius XI, *Casti Connubii*, *AAS*, 22 (December 31, 1930) 552; *Five Great Encyclicals*, (New York: The Paulist Press, 1939), p. 87; Cf. *Codex Juris Canonici*, Canon 1118.

tum non consummatum, may be dissolved by the power of the Holy See in certain cases, but these dissolutions are made by the divine authority which God has given to his Church, and confer spiritual benefits which compensate for any temporal harm which may result. They occur rarely and under restricted conditions and hence are not destructive of the general ends of marriage. The words of Christ are clear and firm. No man, no state, nor human agency of any kind, of its own authority, has ever had or will have the power to sever a true marriage bond. The state, therefore, has no power whatsoever to grant an absolute divorce which in the mind of the law itself purports to break a valid bond and to permit a true remarriage.

B. The Church, State and Marriage

It is true that the state has certain definite regulating powers over natural marriages of unbaptized citizens. For them the state can establish invalidating and prohibitive-impediments, together with rules and procedures for entrance into the married state, provided these regulations are in accord with right reason.[20] It is equally true, however, that even over these marriages, in consideration of the intrinsic nature of marriage itself and Christ's command, the power of the state does not extend to the dissolution of the bond.[21] Pope Pius XI makes this clear when he writes:

> This inviolable stability, although not in the same perfect measure in every case, belongs to every true marriage, for the words of the Lord: "What God has joined together let no man put asunder," must of necessity include all true marriages without exception, since it was spoken of the marriage of our first parents, the prototype of every future marriage.[22]

[20] Petrus Cardinalis Gasparri, *Tractatus Canonicus de Matrimonio,* (Ed. 9, Romae: Typis Polyglottis Vaticanis, 1932), n. 240; Felix Cappello, *De Sacramentis,* V, n. 75.

[21] H. A. Ayrinhac, *Marriage Legislation in the New Code of Canon Law,* p. 13; Cappello, *op. cit.,* V, n. 81.

[22] Pope Pius XI, *Casti Connubii, AAS,* 22 (Dec. 31, 1930) 551; *Five Great Encyclicals,* p. 86.

Pius XI then quotes his predecessor Pope Pius VI in regard to this question.

> "Hence it is clear that marriage even in the state of nature, and certainly long before it was raised to the dignity of a sacrament, was divinely instituted in such a way that it should carry with it a perpetual and indissoluble bond which cannot therefore be dissolved by any civil law. Therefore, although the sacramental element may be absent from a marriage as is the case among unbelievers, still in such a marriage, inasmuch as it is a true marriage there must remain and indeed there does remain that perpetual bond which by divine right is so bound up with matrimony from its first institution that it is not subject to any civil power.[23]

If the state does not have the power to dissolve the bond even of natural marriages, much less can it dissolve the bond of the marriages of baptized persons. In view of the power Christ gave to His Church in religious matters, and because Christ raised matrimony to the dignity of a sacrament, the Church claims full, independent and exclusive authority and jurisdiction over the marriages of baptized persons.[24]

In his encyclical *Arcanum*, Pope Leo XIII speaks of the Church's power over the sacrament of matrimony, power given to it by Christ Himself.

> Christ, therefore, having renewed marriage to such and so great excellence, commended and entrusted all the discipline bearing upon these matters to His Church. The Church, always and everywhere, has so used her power with reference to the marriage of Christians, that men have seen clearly how it belongs to her as a native right; not being made hers by any human grant, but given divinely to her by the will of her Founder.[25] As then, marriage is holy by its own power, in its own nature, and of itself, it ought not to be regulated and administered by the will of civil rulers, but by the divine authority

[23] *Ibid.*

[24] *Codex Juris Canonici*, Canon 1016.

[25] Pope Leo XIII, *Arcanum Divinae*, *ASS*, 12 (1879/80) 390; *The Great Encyclical Letters of Leo XIII*, p. 65.

> of the Church, which alone in sacred matters professes the office of teaching.[26]

Over marriages involving baptized persons the state has no power regarding the bond and its essentials. Since, however, these marriages are necessarily related to the social order, the state does have a rightful interest in them, and a rightful authority over their merely civil effects, that is, effects which pertain to the temporal order and are separable from the marriage contract, as for example, legal residence, suffrage, dowry, and citizenship.[27] Leo XIII recognizes and explains that the state has power over the civil effects of matrimony.

> Moreover, she is not unaware, and never calls in doubt, that the Sacrament of Marriage, being instituted for the preservation and increase of the human race, has a necessary relation to the various circumstances of life which, though connected with marriage, belong to the civil order, and about which the State rightly makes strict inquiry and justly promulgates decrees.[28]

This power, however, which the state has with regard to the civil effects of the marriage contract cannot ever be extended to include the power of breaking the bond of a valid marriage. If a marriage is valid, whether it is a natural marriage or whether it involves a baptized person, its enduring, indissoluble bond cannot be broken by any human power. The state simply does not have any power to sever any marriage bond whatsoever that is valid before God and the Church.

C. The State and Divorce Laws

Yet despite the inherent sacredness of the natural marriage contract, despite the fact that marriage between baptized persons has been raised to the dignity of a sacrament and the marriage involving any baptized person is under the

[26] *Ibid.*, *ASS*, 12, p. 392; *op. cit.*, p. 68.
[27] Bouscaren-Ellis, *Canon Law*, p. 407; Ayrinhac, *op. cit.*, p. 12.
[28] Pope Leo XIII, *op. cit.*, *ASS*, 12 (1879/80), 399; *Op. cit.*, p. 78.

full authority of Christ's true Church, despite the divine command that the marriage contract validly entered into cannot be severed by any human authority or agency, we find through history that men and governments, disregarding the word of God and declaring that man can put asunder what God has joined together, have proceeded to grant divorces. We therefore find governments and states enacting laws permitting, not just separation from bed and board, legitimate and necessary in certain instances, but absolute divorce, which declares the previous valid bond broken and permits the entering into a new marriage valid in the eyes of the state, but certainly invalid in the sight of God. In our own United States, every state in the Union has enacted laws permitting divorce with remarriage.[29] Such causes as adultery, cruelty, desertion, impotence, imprisonment or conviction of crime, intoxication, non-support, insanity and a number of other miscellaneous causes are considered sufficient grounds for severing the marriage bond and permitting remarriage to other partners.[30] Such too has been the interpretation and application of the divorce laws that today in many jurisdictions a divorce can be received and another marriage entered into for the most trivial of reasons and with a minimum of difficulty.

What judgment can be made of these divorce laws except to say that they are unjust? They are in direct opposition to the divine law. In enacting these laws the state takes to itself a power which it does not possess. As a human agency it defies the law of God and attempts to rend asunder what God has joined together, attempts to terminate the marriage

[29] Chester G. Vernier, *American Family Laws*, (Stanford University: Stanford Univ. Press, Calif., 1932), II, pp. 3-4. South Carolina was the last of the states to pass a divorce law. In this state a law granting divorce from the bonds of matrimony on the grounds of adultery, desertion, physical cruelty and habitual drunkeness was approved April 15, 1949. Cf. *Acts and Joint Resolutions of the General Assembly of the State of South Carolina*, Regular Session of 1949, First Part, (Printed under direction of Joint Committee on printing, General Assembly of South Carolina), No. 137, pp. 216-20.

[30] *Ibid.*

bond and to permit remarriage contrary to an express divine command. The state has no right whatsoever to declare a valid marriage no longer existent and to permit entrance into a new contract, and whatever laws it does make in this regard are invalid and totally ineffective in breaking the real marriage bond. In the sight of God a validly married couple are still validly married even after the state hands down its divorce decree. What God has joined together no man can put asunder. It must be said too in judgment of the laws of the states that in claiming for themselves power, other than over civil effects, over the marriages of baptized persons, they are claiming a jurisdiction which in no way can be called their own.

It may be objected, and it is true, that some religious groups and churches so interpret the Scriptures as to permit absolute divorce in case of adultery or immorality of one of the parties. In light of this interpretation, is not the state privileged to grant divorces? As has been mentioned before, such an interpretation is erroneous and cannot be admitted. A critical study of the texts referring to divorce and their comparison, together with the traditional interpretation and official declarations of the one true Church of Christ, show that while separation is permitted for these reasons, yet they cannot be a cause for breaking the bond. Other churches are totally lacking in authority to give definitive interpretations to Scriptural passages. It is only the true Church of Christ, the Catholic Church, which has from God the power and mission to interpret the Scriptures authoritatively, and to give the true teaching in matters of faith and morals.[21]

D. Divorce Statistics

Widespread divorce laws and the ease with which divorces are obtained have had drastic results in the United States. Statistics show that in 1867 there were in our land 357,000 marriages and 9937 divorces, or one divorce for every 36 marriages. In 1900 the ratio reached one divorce for every

[21] *Codex Juris Canonici*, Canon 1038.

12.7 marriages. By 1925 the average was one divorce to 6.77 marriages. The year 1946 reached a new all time high both as to marriages, of which there were 2,291,045, and divorces, which numbered 610,000. This gives the United States for 1946 the record of one divorce to every 3.75 marriages. The year 1947 was a little more favorable and the ratio was one divorce to 4.12 marriages, and 1948 rated one divorce to 4.49 marriages.[32] According to the provisional figures for 1949 a rise was again indicated in the ratio of divorces to marriages. Estimated figures, released April 16, 1950, show that in 1949 there were 1,585,440 marriages and 386,000 divorces.[33] This gives us the ratio of one divorce to every 4.1 marriages. The number of divorces granted in the United States in the ten years from 1939 to 1949 comes to the total of 4,257,000.

E. Evils of Divorce

These are enormous figures relating facts evil in themselves and productive of many others. They betray a shallowness of thought, an absence of an understanding of the sacred purpose of human existence and the holy purpose of the married state. They reveal a substitution of man's views for the law of God. Such a vast number of divorces cannot but be productive of a nationwide instability of family life and the consequent weakening of our nation. Most of our juvenile problems have their basis in the broken home.

Speaking of the evils that flow from divorce, His Holiness, Pope Leo XIII, in his masterful encyclical on Christian marriage, wrote to the world over seventy years ago, in 1880:

> Truly it is hardly possible to describe the magnitude of the evils that flow from divorce. Matrimonial contracts are by it made variable, mutual kind-

[32] *Provisional Marriage and Divore Statistics*, United States, 1948, (Washington, D.C. National Office of Vital Statistics), Vol. 31, No. 16, Nov. 4, 1949, pp. 228-9.

[33] *Marriages and Divorces, and Crude Rates: Continental United States, Each State, and Territories and Possessions, 1949*, (Wash., D.C., Natl. Office of Vital Statistics), Advance Release, April 16, 1950, p. 2-3.

> ness is weakened, deplorable inducements to unfaithfulness are supplied, harm is done to the education and training of children, occasion is afforded for the breaking up of homes, the seeds of dissension are sown among families, the dignity of womanhood is lessened and brought low, and women run the risk of being deserted after having ministered to the pleasures of men. Since, then, nothing has such power to lay waste families and destroy the mainstay of kingdoms as the corruption of morals, it is easily seen that divorces are in the highest degree hostile to the prosperity of families and states, springing as they do from the depraved morals of the people, and, as experience shows us, opening out a way to every kind of evil-doing in public as well as private life.[34]

Continuing, Pope Leo XIII says that if the matter is diligently considered one can see that these evils are especially dangerous, because once divorce is tolerated no restraint will be strong enough to keep it within the bounds that have been set for it. If the force of example is great, greater is the force of passion. From these two forces, example and passion, he points out that one can expect an eagerness for divorce to spread itself in devious ways and to afflict the minds of many "like a virulent contagious disease."[35] Experience shows, Leo XIII continues, that as soon as the road to divorce is made smooth by law, quarrels, jealousies, judicial separations and such shamelessness of life follow so as "to make even those who previously had favored divorces repent of their action lest, if a remedy is not sedulously sought, by repealing the law, the State itself might come to ruin."[36]

Pope Pius XI writing fifty years later in 1930 in his encyclical on Christian marriage, *Casti Connubii*, makes his own the words of Leo XIII. He declares once more that the far reaching effects of the evil of divorce are a "formidable

[34] Pope Leo XIII, *Arcanum Divinae*, *ASS*, 12 (1879/80) 396; English translation from *The Great Encyclical Letters of Leo XIII*, pp. 74, 75.

[35] *Ibid.* [36] *Ibid. ASS*, 12, p. 397.

menace to the whole human society,"[37] and points out for all to see the "daily increasing corruption of morals and the unheard degradation of the family"[38] in those lands where the unlimited use of divorce has been practiced. In 1948 the Catholic Bishops of the United States in their national pastoral statement speak of secularism, the practical exclusion of God from human thinking and living, as completely undermining the stability of the family as a divine institution and as having given our country the greatest divorce problem in the Western world.[39] They speak of "a sixty-fold increase in our divorce rate during the past century" as one of the "terrible evils" which secularism has brought to our land.[40]

F. The Catholic Judge and Divorce Cases

In carrying out the manifold duties of his public office the Catholic judge may be called upon, and sometimes quite frequently, to give judgment in divorce cases. In light of Christ's teaching on divorce, of the Church's necessary full and faithful adherence to that teaching, and of the tremendous evils that flow from divorce, one can readily understand that taking part in divorce proceedings is for the Catholic judge a perplexing problem. In the light of Catholic principles is the Catholic judge permitted to handle divorce cases? If so, how does he justify himself? What is to be his mode of action and what are his obligations in handling the cases?

There are in reality three types of divorce cases the Catholic judge may be asked to hear, first, those in which persons seeking divorce are presently joined in an invalid union; second, those in which the persons seeking the divorce have entered into a valid marriage which has already been or is

[37] *Casti Connubii, AAS*, 22 (Dec. 31, 1930) 575; *Five Great Encyclicals*, p. 104.

[38] *Ibid., AAS*, 22, p. 576; *op. cit.*, p. 105.

[39] *The Moral Catastrophe of Secularism* by the American Hierarchy, (New York: The Paulist Press, 1948), pp. 4, 8, 9.

[40] *Ibid.* pp. 9-10.

about to be dissolved by the divine authority Christ gave to his Church; and third, cases in which couples are joined in a valid marriage which cannot be dissolved by the divine authority of the Church. We shall consider each of these three types.

In the first type, wherein the couple seeking the divorce are joined in a union recognized by the state but invalid before God, there is no difficulty in the Catholic judge's granting the divorce.[41] There is no intrinsic harm in declaring as severed before the state a marriage that was always invalid before God. And indeed the judge ought to grant it, since it has the effect of publicly dissolving an invalid union. Catholics who have attempted marriage before a civil magistrate or a non-Catholic minister and non-Catholics validly married, divorced and remarried offer examples of this case. In exercising her right and duty to legislate for the administration of the sacraments and for her own members, the Church has ruled that Catholics, if they are to receive marriage validly, must be married before an authorized priest and two witnesses.[42] Should a Catholic neglect this required form, and attempt marriage before a civil magistrate or a non-Catholic clergyman, the attempted marriage is invalid in the sight of God, even though the state recognizes it as valid. Such a Catholic then is actually not married. Should such a person subsequently desire to enter a new and this time valid marriage in the Church, before doing so it is necessary for him to secure a civil divorce from his first invalid civil union, else he runs the risk of being charged by the state with bigamy. In a case of this sort, civil law being

[41] Connell, *Morals in Politics and Professions*, p. 30; Cappello, *De Sacramentis*, Vol. V, *De Matrimonio*, n. 834; Iorio, *Theologia Moralis*, III, n. 996.

[42] *Codex Juris Canonici*, Canon 1094. Canon 1098 lists two exceptions when marriage can be validly contracted before two witnesses only: when one or both of the Catholic parties to be married are in danger of death and a duly authorized priest cannot be obtained without grave inconvenience, and outside the danger of death if it is prudently foreseen that the duly authorized priest cannot be obtained without grave inconvenience for a period of a month.

what it is, there is a real need for a civil divorce and the Catholic judge may and ought to grant it. Also, non-Catholics who validly marry, obtain a divorce and then enter into a second marriage while their former partner is still living indeed enter into invalid remarriages. Since these second marriages are not valid, the judge may grant civil divorces from them when such cases come before his court for dissolution. If, however, for some particular reason the granting of the civil divorce will be a cause of grave scandal or if for some reason proper ecclesiastical authority forbids it, it ought not to be granted.[43]

Likewise in the second type of case, those in which couples have entered into valid unions which have been or are about to be dissolved by ecclesiastical authority, the Catholic judge may and should grant the divorce. Such, for example, is the case of the Pauline Privilege, the case of the Privilege of the Faith, and the case of a marriage *ratum non consummatum.* The Pauline Privilege, so called because it was promulgated by St. Paul in virtue of his power as an apostle, may be applied in the case of two unbaptized persons validly joined in a natural marriage, one of whom later is converted to the Christian faith, validly receiving the sacrament of baptism. Should the non-baptized party to the marriage thereafter be unwilling to live peaceably with the Christian party without blaspheming the Creator,[44] the latter is privileged to enter upon a new marriage. When the new marriage is contracted, the first marriage is dissolved and the non-baptized party is also free to contract a second marriage.[45] The first and natural marriage, however, is recognized by the state as a valid one. The Christian party, therefore, before entering the new marriage must secure a civil divorce from the first one, if he is not to be exposed to a charge of bigamy. Should a judge, therefore, know that a person is seeking a civil divorce with a view to entering a second marriage by virtue of

[43] Connell, *op. cit.*, p. 30.
[44] *Codex Juris Canonici*, Canon 1121.
[45] *Codex Juris Canonici*, Canons 1120-1126.

the Pauline Privilege (ecclesiastical authority permitting), he may and ought to grant the divorce.

Somewhat wider than the Pauline Privilege, which presupposes a valid marriage between two unbaptized persons, is the Privilege of the Faith, in which the Holy Father, exercising the fulness of his apostolic power may for a grave cause dissolve the natural bond of a marriage validly contracted between a baptized person and an unbaptized person.[46] Should, therefore, the Catholic judge know that a certain marriage has been or is soon to be dissolved by reason of the Privilege of the Faith, and a party thereof is now seeking a civil divorce in order to be able legally to enter a second and valid marriage, he may and ought to give the judgment of civil divorce.

A marriage *ratum non consummatum* is a sacramental marriage validly entered into by two baptized persons, but one in which the normal physical marital action in itself suitable for generation has not taken place.[47] The Holy Father has power to dissolve such a marriage.[48] Here again if the Catholic judge knows that such a marriage has been or is soon to be dissolved by the Holy See and a party thereof is seeking a civil divorce to make it legally possible to enter another marriage without being subject to a charge of bigamy, the judge may and ought grant the decree of civil divorce.

It is clearly seen in the above cases that the judge does no wrong in granting the divorces. The persons concerned are before God free or very soon will be free to enter new marriages. The civil divorces here granted are not inherently evil and are necessary requirements to free the parties from the possibility of state charges of bigamy.

The third type of divorce with which the Catholic judge is confronted is that in which the persons concerned are joined in God's sight in a valid marriage which is not able to be

[46] Ayrinhac, *op. cit.* p. 322ff.
[47] *Codex Juris Canoici,* Canon 1015, 1.
[48] *Ibid.* Canon 1119.

dissolved, since no legitimate cause or reason is present for the dissolution of the marriage by the divine power of the Church. A valid natural marriage between two unbaptized persons when the Pauline Privilege cannot or will not be applied, a valid marriage between a baptized and an unbaptized person when the Privilege of the Faith is not applicable, a non-consummated valid Christian marriage or a non-consummated marriage between a baptized and an unbaptized person for the dissolution of which no special Papal dispensation has been, or will be, granted, and finally a valid Christian marriage that has been consummated—these are all marriages of the third type, all valid in God's sight and for the dissolution of which there is no reason, cause and, in the last case, no possibility. In these cases divorce is sometimes sought merely for its civil effects with no thought of remarriage, and sometimes for the express purpose of making legal way for a new, but, of course, invalid marriage.

Should the Catholic judge be faced with a case involving a natural marriage in which he is morally certain that the parties are seeking the divorce merely for its civil effects, that no attempt at a second marriage will be made by either of the parties and that a just cause and the legal grounds required for the divorce are present, as an official of the state he may grant the divorce. Because of the tremendous evil in divorce to the home and society, even when there is no idea of remarriage, the judge ought to do all he can to protect the marriage bond. Before granting the divorce, therefore, he should do what he can to effect a reconciliation between the parties. If reconciliation is impossible, in those states in which the desired civil effects can be obtained through a limited divorce, the judge ought to grant this type of divorce, if it can be done, rather than the absolute divorce. Since the limited divorce in itself does not attempt to break the bond, and is equivalent to a separation from bed and board, it is preferred as the lesser of two evils. An absolute divorce, however, may be granted if it is necessary according to the civil law in order to gain the desired civil effects, of course,

with the moral certainty that there will be no remarriage. In practice the Catholic judge may apply the principles stated in this paragraph also to cases involving a baptized non-Catholic and an unbaptized person, or two baptized non-Catholics, whenever divorce is requested for its civil effects and there is moral certainty of no remarriage. While it is true that matrimonial causes involving baptized persons belong to the exclusive tribunal of the Church,[49] and strictly speaking ecclesiastical permission should be obtained by all baptized persons before requesting civil divorce for its civil effects, yet, in practice, the Church does not insist that baptized non-Catholics adhere to the form of obtaining ecclesiastical permission. The Catholic judge need not, therefore, inquire if this permission has been granted.

The case is somewhat different, however, if a Catholic party seeks a civil divorce solely for its civil effects with no thought of remarriage. Insisting upon the Church's exclusive right over matrimonial causes involving Catholics, the Third Council of Baltimore forbade Catholics, under pain of grave sin, to approach the civil court for obtaining separation from bed and board without first obtaining the consent of the proper ecclesiastical authority,[50] the ordinary of the diocese.[51] Once the Catholic party has obtained the proper permission to have recourse to the civil court, the Catholic judge may grant the divorce. The type of divorce granted ought to be the limited divorce if it is sufficient to obtain for the petitioner the desired civil effects. But even an absolute civil divorce may be granted by the judge if this is necessary according to the existing laws of the state to obtain

[49] *Codex Juris Canonici*, Canon 1016; Concilium Tridentinum, Sessio XXIV, Canon 12; Cf. Denzinger, *Enchiridion Symbolorum*, 982.

[50] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii* (Baltimore: John Murphy Co., 1886), n. 126, pp. 64-65.

[51] James P. Kelly, "Divorce—Some Practical Canonical Considerations," *The Jurist* (Washington Catholic Univ. of Amer., School of Canon Law, Wickersham Ptg. Co., Lancaster, Pa.) Vol. 9 (April 1949), p. 198.

the civil effects the petitioner rightfully seeks. The Catholic party who knowingly and willingly seeks a civil divorce for its civil effects without the consent of Church authorities sins gravely. When permission has not been obtained the Catholic judge must have a very good reason for accepting such a case and pronouncing a divorce, even though he is morally certain no remarriage will take place. If it can be done the judge should urge the Catholic party to seek the proper permission, but if the party will not and the judge is constrained by the duty of his office to handle the case, he may do so.[52]

The most difficult divorce case for the Catholic judge to handle, and which unfortunately is quite frequent in our land, is the case wherein a divorce is sought from a valid marriage with good reason to believe that should it be granted, one or both of the parties will attempt a new and invalid marriage. It is this type of divorce case that the Holy Father, Pope Pius XII, spoke of in his talk to the jurists of Italy. Some theologians have held that a divorce of this kind is intrinsically evil, that is, evil in its very nature, and therefore can never be permitted for any reason whatsoever.[53] If this opinion is accepted as the true one, then the Catholic judge could never sit in a divorce case of this kind and grant the divorce judgment. Other theologians, how-

[52] Connell, *op. cit.*, p. 32.

[53] Joseph Aertnys, *Theologia Moralis* (Tornaci: H. et T. Castermann, 1893), II, n. 522; Januarius Bucceroni, *Institutiones Theologiae Moralis* (Romae : Ex Typographica Augustiana, 1900), II, n. 983; M. M. Matharan, *Asserta Moralia* (Paris: G. Beauchesne & Co., 1909), n. 295; Rosset, *De Sacramento Matrimonio* (Parisiis: Roger et Chernoviz, 1896), VI, n. 4085, p. 411—where he also cites others holding this view. "Certa mihi videtur sententia quae negat licere sententiam divortii aut separationis ferre, vel ei cooperari, quando matrimonium est validum coram Ecclesia, aut nulla ratio canonica pro separatione. Hanc sententiam potissime propugnavit in Gallis P. Baudier; eam docet Romae P. Bucceroni in Universitate Gregoriana; eam tenuit Card. Zigliara, et illam amplexus Marc in extremis. Oppositam tenuerat, sed postquam prodiisset Decretum S. Officii 25 June, 1885 ab illa recessit."

ever, expressing the more common view, hold that the act of the judge in pronouncing a divorce of this kind, even if remarriage is certain, is not intrinsically evil, but is proximate mediate material cooperation in the evil of the invalid remarriage.[54] They say, therefore, that the judge is permitted to grant the divorce when there is present a sufficiently weighty reason.

When the state purports to break the bond so that a new marriage can be validly entered into, it attempts something beyond its reach. Actually, therefore, for the state to claim that in reality it breaks the bond, to intend to do so and to

[54] Aertnys-Damen, *op. cit.*, II, n. 925; Cappello, *op. cit.*, n. 834, 839; Noldin-Schmitt, *op. cit., III*, n. 669; Prümmer, *op. cit.*, III, n. 893; Merkelbach, *op. cit.*, III, n. 977; Lehmkuhl, *op. cit., II*, n. 921 in note; Wouters, *op. cit.*, II, n. 844; Iorio, *op. cit.*, III, n. 996; F. X. Wernz, *Jus Decretalium*, IV, *Jus Matrimoniale* (Romae: Ex Typographia Polyglotta, 1904), n. 750; Genicot-Salsmans, *op. cit.*, II, n. 561; Cl. Marc-F. X. Gastermann, *Institutiones Morales Alphonsianae* (ed. 18, Lugduni: Typis Emanuelis Vitte, 1927), n. 2126; Benedictus Ojetti, *Synopsis Rerum Moralium et Juris Pontificii*, (ed. 3, Romae: Ex Officina Polygraphica Editrice, 1912), III, Syndicus, n. 3894; Aloysius De Smet, *De Sponsalibus & Matrimoio* (Brugis: Car. Beyaert, 1927), n. 393ff.; F. X. Wernz-Petrus Vidal, *Jus Canonicum*, Vol. V, *Jus Matrimoniale* (Romae; Apud Aedis Universitatis Gregoriana, 1946), n. 712; P. Chretien, *De Matrimonio*, (ed. 2, Metis: Typis Imprimerie Du Journal, 1937), n. 57 bis, p. 93; V. Heylen, *De Matrimonio*, (ed. 9, Mechliniae: H. Dessain, 1945), pp. 373-374; G. Peyen, *De Matrimonio*, (Zi-ka-wei: In Typographia T'ou-se-we, 1936), III, n. 2516,—where he says: "Judex civilis nonnisi ad effugiendum *gravissimum damnum*, qualis certe est amissio officii, atque insuper nonnisi palam agnita propria et exclusiva Ecclesiae competentia, servatis conditionibus de quibus diximus, id est, spectando solos effectus civiles, et praemissa, hac de sua mente, clara monitione, *probabiliter* potest, necessitate parens, divortium civile pronuntiare. In casibus difficilioribus Ordinarium consulat." So also Gasparri, who formerly was inclined to the more rigid opinion. He says: "At, quidquid sit de anteactis temporibus, quando nos ipsi in rigidam opinionem inclinabamur, cui S.C.S. Officii, quae in his questionibus suprma est, favere videbatur, hodie S. Officium mitiorem sententiam sequi videtur." For Gasparri's treatment of this whole problem, and for comment on the decrees of the Holy Office and the Sacred Penitentiary concerning civil divorce see *op. cit.*, nn. 1304-1326.

try to do so is to perform an action intrinsically evil, opposed in its very nature to God's law. An analysis of the action of states in writing their divorce laws indicates without doubt that they really intend in absolute divorce to sever the real marriage bond. The very fact that remarriage is permitted is sufficient evidence of this. To associate oneself with the intention to sever the real bond is truly something intrinsically evil. And the judge who would grant an absolute divorce sharing the intention of the law would sin in formally cooperating in an action *in se* evil.

Yet, in granting an absolute divorce in the court the Catholic judge need not perform an action intrinsically evil. It is true the divorce laws of our states intend to break the real bond and hence in themselves are intrinsically evil. But the Catholic judge need not associate himself with the evil intent of these laws, nor with the evil intention of the parties seeking the divorce and remarriage. He can disassociate himself by declaring that all he intends to do is to exempt the parties from the civil recognition of the effects of their marriage. The non-conformity of the judge with the evil intention of the law removes from the divorce action one aspect *in se* evil. Once the evil intention is discarded, the judge's declaration that in the eyes of the state the persons are no longer considered husband and wife is not an action intrinsically evil, since the judge in his declaration of the civil divorce declares exactly what is the true nature and effect of his act, namely, that in the eyes of the state the man and woman are no longer considered husband and wife. That is all his act effects; that is all he actually does. He has no power to do more than that. The judge's declaration, then, is the true assertion of an actuality, and as such, in itself, is not intrinsically evil. Nor again is scandal so tied up with the judge's action as to make the pronouncement of the divorce *in se* evil. The position of the Catholic Church and of the Catholic judge, that when the judge so acts he breaks not the real bond but only the civil bond, is clearly and publicly known. Nor finally is the remarriage of the parties so con-

nected with the judge's pronouncement of divorce as to make that pronouncement *in se evil.* If remarriage were necessarily bound up with the granting of the divorce so that it was not separable from it, and commanded by it, we would have to say that the judge's granting the divorce were evil *in se.* But such is not the case. In granting the divorce the judge is not commanding an invalid marriage; he only says the state no longer considers this man and woman husband and wife. The remarriage need not and in many cases does not necessarily follow. If, therefore, the Catholic judge, knowing that he cannot sever the bond of a valid marriage, does not join in the evil intention of the law, if all the Catholic judge does is to declare officially that in the eyes of the state and as regards the civil effects of their marriage the two parties are no longer considered husband and wife, if an invalid remarriage need not necessarily follow, and if the position of the Catholic Church and the Catholic judge is sufficiently well known to remove scandal—if these conditions are fulfilled, then the action of the judge in granting a civil divorce is not something intrinsically evil.

Nevertheless, when the judge foresees that an attempted remarriage will certainly or probably take place after the divorce, his act of granting it is closely tied up with the evil of remarriage, making that evil union legally possible. The judge's judgment becomes indirect and mediate material cooperation in the evil of this sin. According to the principles of material cooperation, the judge must have a sufficiently weighty reason for permitting the evil effect of remarriage.[55] The fact that should they refuse to grant the divorces, abuse and criticism would be heaped upon Catholic judges with loss of prestige, and the fact that they might even be forced from office with resulting grave harm to an honest judiciary are considered sufficiently weighty reasons for their giving the divorce decrees.

To the more common view Pope Pius XII lends his teach-

[55] Prümmer, *Manuale Theologiae Moralis,* III, n. 893.

ing authority. In speaking to the jurists of Italy, the Holy Father said:

> In particular, a Catholic judge cannot pronounce, except for reasons of great weight, a sentence of civil divorce—where this is in force—for a marriage valid before God and Church. He must not forget that such a sentence, in practice, does not come to touch only the civil effect but in reality rather conduces to the erroneous consideration of the actual bond as broken and of the new one as valid and binding.[56]

One clearly sees that in these words the Holy Father is following the more common Catholic teaching on this subject—that the granting of a civil divorce for marriages valid before God and the Church is not intrinsically evil and hence can be permitted. He says, however, that in practice, that is, when such civil divorces are granted, in the popular mind, and in the minds of those receiving them, they are often looked upon not just as producing civil effects, but wrongly are considered as breaking the actual existing bond of valid marriage and permitting the entrance into a new marriage valid and binding. Since, therefore, these evils are so closely allied with absolute divorce, the judge is permitted to grant divorce in this case only for reasons of great weight.

In our own United States in our day it may safely be said that Catholic judges have at times sufficiently weighty reasons for granting divorces from marriages valid before God and the Church, even when there is probability or certainty of remarriage. Should a Catholic judge be called upon in his office to grant such a divorce in accordance with the existing, even though unjust, law refuse to do so, in all probability he would suffer serious abuse, criticism, loss of prestige and possibly the loss of his office. The reaction that occurred when Pope Pius XII restressed Catholic principles on this matter in his talk to the jurists is a recent indication of the criticism one could expect to arise. It is thought that as a

[56] Pope Pius XII, "Address to the Union of Italian Catholic Jurists," *AAS*, 41 (December 22, 1949), 603; *The Catholic Mind*, 48 (January 1950), 58.

result grave harm would be done to the position of Catholic judges in our country, and should they be forced to resign, or unable to obtain office, grave harm would be done to the entire judiciary. Theologians in the United States consider these reasons sufficiently present and weighty for Catholic judges here to grant such divorces when they must do so in the course of fulfilling the duties of their office.[57] They must keep in mind all the while, however, that it is only the civil bond and its effects they sever and not the real bond valid before God. The real bond endures after their decree.

We have seen that according to the more common view and according to the teaching of Pope Pius XII, in cases of marriages valid before God and the Church, the Catholic judge for reasons of great weight may grant civil divorces, which in no wise, however, sever the true marriage bond. The judge, on his part, we have seen, is considered to have sufficiently weighty reason for so acting if his refusal to grant these divorces would subject him to serious criticism, loss of prestige and possible loss of office, with harm done to the maintenance of an honest judiciary. Also on the part of those seeking the divorce the reasons or grounds they offer as evidence must not be trivial but weighty to the extent of satisfying the strict interpretation and requirements of the civil law.[58] Should the reasons, grounds and evidence offered not comply with the strict interpretation and requirements of the civil law then the divorce cannot be granted.

If the Catholic judge, therefore, may grant these divorces for reasons of great weight, what are his obligations and his

[57] Sabetti-Barrett, *Compendium Theologiae Moralis* (New York: Frederick Pustet Co., Inc., 1920), p. 477; A. Konings, *Theologia Moralis S. Alphonsi Compendium* (New York: Benziger Bros., 1877), n. 1053; Francis P. Kenrick, *Theologia Moralis* (Baltimore: John Murphy Co., 1866), Tractatus VIII, 114; Connell, *op. cit.*, p. 31; Harding, *op. cit.*, p. 3347.

[58] Connell, "Duties of Judges," *The Record*, November 19, 1949, p. 8; V. Heylen, *De Matrimonio*, (ed. 9, Mechliniae: H. Dessain, 1945), p. 374—"Vi enim officii judices divortium pronuntiare coguntur, quoties legaliter requisita verificantur, sin minus munere suo destituerentur, idque cum gravissimo tum Status, tum Ecclesiae detrimento."

ordinary manner of action in handling such a case in the daily performance of his duties of office? Normal judicial procedure in our land requires the judge to hear what cases come before him. He is not free to accept or to reject them at will. Granted, however, a situation in which the Catholic judge should have a choice of either accepting or rejecting a case of this type, we should say first of all, that if the Catholic judge in some way should foresee that those seeking the divorce, even though intending remarriage, have not a true legal cause on which to obtain it and consequently he will be able to deny it on insufficient grounds, or should he foresee some other possible way of keeping the parties together, he would have a good reason for accepting the case in his court. On the other hand, if he fears the presence of a true legal cause, and does not foresee a possibility of keeping the parties together, then, because of the evil of remarriage so closely connected with these divorces, because many think the real bond is broken, and because of the evil of divorce in general to home and society, the Catholic judge is obliged to do what he can to avoid accepting the case.[59] If, nevertheless, it is not possible to take the case conveniently before another judge and the Catholic judge must accept it, he may in conscience do so. Having accepted it he is obliged to do what he can to reconcile the parties and keep them together. If his efforts at reconciliation prove fruitless and the parties persist in their attempt to obtain the divorce, then the Catholic judge is obliged to examine closely the legal grounds on which the divorce is sought to see that they are not false or flimsy, but solid and according to the strict interpretation of the laws of the state. If the divorce is sought on false or shallow grounds, which do not fulfill the strict requirements of the civil law, the Catholic judge cannot grant the divorce decree. Nor in his interpretation of the divorce laws is the Catholic judge permitted to take as precedents the broad interpretations of some courts which have made a travesty of sacred marriage and granted divorces to disgruntled par-

[59] Connell, *Ibid.*

ties for the slightest of reasons. Such court actions make divorce and the disruption of the marriage contract a trivial, cheap and easy thing. If close examination and interpretation, however, show the parties have a solid legal cause for the divorce, the judge may grant the divorce decree, mentioning to the parties that since in their petition and grounds for divorce they have satisfied legal requirements, it is incumbent upon him as a proper judicial officer to declare that the state no longer considers them husband and wife. In his own heart and mind the Catholic judge remembers that in reality he is severing only the civil bond[60] and that he has his own reasons of great weight for this action so closely allied with a possible invalid remarriage, namely, that should he refuse to grant it, the position of Catholic judges would become untenable in our land.

G. The Catholic Judge as an Official at Marriage

According to the law of our land the Catholic judge in the performance of his duties as a public official may be called upon at times to officiate at marriages. If both the parties seeking marriage are non-Catholics, are free to enter a union valid before God, and have fulfilled the requirements of the civil law, the Catholic judge may unhesitatingly officiate.[61] Needless to say at the wedding the judge's official participation should be done with a decorum fitting the sacred contract upon which the parties are entering. He should remember too that when both parties are baptized, he is officiating at the true and valid reception of the sacrament of matrimony.

Normally the marriages of Catholics to be valid must take place before an authorized priest and two witnesses.[62] Canon 1098 of Church's law, however, lists two occasions when this required form is not demanded. According to this Can-

[60] Heylen, *op. cit.*, p. 374 and note 1.
[61] Connell, *Morals in Politics and Professions*, p. 32.
[62] *Codex Juris Canonici*, Canon 1094.

on, when one or both of the parties desiring to be married are in danger of death, and no authorized priest can be secured without grave inconvenience, or outside the danger of death, when it is prudently foreseen that a priest cannot be had for a month, the marriage may validly and licitly be contracted without the priest in the presence of two witnesses only. The Catholic judge may lawfully assist at Catholic marriages of this kind.

A difficult problem arises when the Catholic judge is asked to officiate at a marriage which he knows for certain or gravely suspects will be an invalid union. This would be the case when the judge knows or suspects one or each of the parties requesting the marriage is a divorced person, or when one or both of the parties are Catholics attempting a civil marriage, or when he is aware of some other impediment invalidating the marriage. The Catholic judge's mode of action and his obligations in this case have been very much discussed by the theologians. Basing their contention on a number of responses issued from the Holy Office and from the Sacred Penitentiary before 1900, some theologians have maintained that the Catholic judge may not witness such a marriage even if by refusing he should be required to give up his office.[63] Other theologians, expressing the common opinion which can be safely followed, say that under certain circumstances the judge may officially assist as witness in such marriages.[64] These authors point out that although the replies from the Holy Office and the Sacred Penitentiary forbade Catholic judges so to act in specific cases, never in their replies did they class the assistance of the

[63] Cf. Gasparri, *op. cit.*, n. 1302; Cappello, *op. cit.*, V., n. 734.

[64] Felix M. Cappello, *Tractatus Canonico-Moralis De Sacramentis*, (Romae: Marietti, 1947), ed. 5, Vol. V., n. 734; Petrus Cardinalis Gasparri, *Tractatus Canonicus De Matrimonio* (Romae: Typis Polyglottis Vaticanis, 1932), n. 1303; Prümmer, *op. cit.*, III, n. 889; Noldin, *op. cit.*, III, n. 677; Merkelbach, *op. cit.*, III, n. 976; Wernz-Vidal, *op. cit.*, nn. 591, 712; Wernz, *op. cit.*, n. 208; Lehmkuhl, *op. cit.*, II, n. 952 note; De Smet, *op. cit.*, n. 406; Genicot-Salsmans, *op. cit.*, II, n. 476; Payen, *op. cit.*, III, n. 1961.

judge in such a case as an intrinsic evil. They maintain the judge's assistance is not an intrinsic evil, but is proximate material cooperation in the evil of the invalid marriage and therefore can be admitted for a most grave cause. This opinion is based upon a particular decision of the Sacred Penitentiary dated February 13, 1900. In this case the Sacred Penitentiary was consulted as to what should be done in a particular case wherein if the Catholic public official refused to assist in civil marriages of this kind, he would be forced to give up his office, and an irreligious official would be chosen with resultant grave public harm. In its response the Sacred Penitentiary said:

> Attention having been given to particular circumstances, the Sacred Penitentiary advises that the public official is not to be disturbed, who gives his assistance in the proposed case, provided he publicly declares (1) his faith in the Catholic doctrine of the unity and indissolubility of marriage and (2) that he regards his act as a civil ceremony in which he is compelled to take part to avoid greater evils. In addition, he should gravely warn, at least privately, those attempting marriage in this manner of the enormity of their sin and of the absolute invalidity of their act.[65]

In our land the judge is ordinarily free to decline assisting at a particular marriage. The normal course of action for the Catholic judge, therefore, is to refuse to officiate at a marriage he knows certainly or very probably will be in-

[65] Gasparri, *op. cit.*, n. 1303: Ita v.g., se gessit quidam parochus dioc. N***, qui, occurente gravissimo damno publico si, denegata assistentia huiusmodi matrimoniis civilibus, syndicus catholicus officium dimittere cogeretur et areligiosus eligeretur, Sacram Poenitentiariam consuluit. Et Sacra Poenitentiaria, die 13 februarii 1900, respondit: "Attentis singularibus circumstantiis, S.P. censet non esse inquietandum officialem civilem, qui suam operam in casu proposito praestat, dummodo publice declaret se 1° catholicum dogma circa unitatem et indissolubilitatem matrimonii profiteri: 2° actum illum civilem habere uti civilem caeremoniam, eique interesse coactum et ad majora mala vitanda. Graviter insuper moneat, saltem privatim, contrahere hoc modo attentantes de enormitate sceleris, quod committunt et de omnimoda actus nullitate."

valid, and if it can be done the judge is obliged to refuse. If, however, as the above reply indicates, particular circumstances are such that the judge cannot refuse without involving himself in serious difficulties comparable to those mentioned in the above case, he would be permitted to assist at the marriage. It will be necessary for the judge to fulfill the conditions laid down. He must declare publicly his faith in the Catholic doctrine of the unity and indissolubility of marriage, that he regards his act as a civil ceremony done to avoid greater evils, and must seriously warn the parties, at least privately, that they sin gravely and that their marriage is invalid.[66] These conditions must be fulfilled in such a way as to remove effectively the element of public and private scandal.

In practice, faced with the possibility of assisting at a marriage of this sort, the Catholic judge is held first of all, if time and circumstances permit, to consult the Ordinary of his diocese for a proper mode of action. For it belongs to proper ecclesiastical authority to judge whether or not there is present in particular territories a sufficient cause for the judge's assistance at the marriage,[67] and to prescribe the manner of the aforementioned public declarations. If, however, circumstances are such that the judge does not have time to approach ecclesiastical authority, and if in his prudent judgment a sufficiently weighty cause is present, it seems that he may assist at the marriage without recourse to the Ordinary. Should, however, there exist for a particular territory a positive ecclesiastical prohibition of the Catholic judge's assistance at such a marriage, he would not be permitted to assist even if as a result he should be forced to quit his office.[68]

H. Contemporary Thought and Divorce

When the Holy Father, Pope Pius XII, in his talk to the jurists of Italy on November 6, 1949, reminded Catholic

[66] Cf. Connell, *op. cit.*, p. 32-33.
[67] Prümmer, *op. cit.*, II, n. 889, p. 644-645.
[68] Gasparri, *op. cit.*, n. 1302, p. 322.

judges of their duties relative to unjust laws and that they could not grant divorces from marriages valid before God and the Church except for reasons of great weight, there were those who protested he was voicing a new teaching inimical to the welfare of our country and interfering with the lawful powers of the state. The truth is he was voicing no new doctrine, but was repeating the customary and common teaching of Catholic moral theologians. Moreover, far from advocating interference in the rightful powers of the state and teachings harmful to society, he was declaring true basic principles calculated to foster the common welfare and with which the better element of juristic and social thought in the United States today is inclined to agree. As has already been pointed out, the Christian concept of law, so profoundly explained by the Holy Father, and the norms he laid down relative to unjust laws are in conformity with the natural law concepts and norms used officially by our government in its prosecution of the war criminals at Nurnberg. So also what he said on divorce and its evils is at least partially agreed to today by many socially minded non-Catholic thinkers. These persons are deeply interested in the welfare of our nation and are becoming more and more aware of the evils that have come and are coming to our United States because of our tremendously high divorce rate—the highest in the world. While these persons do not understand the inherent evil of divorce with remarriage of validly married couples and admit the power of the state to rend asunder what God has joined together, and while they erroneously maintain that in certain cases divorce of validly married couples with remarriage must be allowed, yet they do see divorce's evils. They see divorce as causing sorrow and sadness to the individually wrecked lives of husband and wife. They see it as creating great social and legal problems, as causing emotional instability in the lives of children of broken homes, and thus leading to the delinquency of young boys and girls. In this respect it becomes a major factor in the perpetration of crime. They see divorce as the greatest enemy of family life, as a weakening of that life and the life

of the nation. They see our divorce laws in their present state as thoroughly bad. And therefore, they reason that as much as possible must be done to prevent so great a number of divorces, and thus to protect the family in the United States from the ravages that divorce effects.

In a series of articles on divorce appearing in the *Saturday Evening Post,* captions talked of it as of the "sordid story of America's broken homes," as of "our biggest national scandal,"[69] and the question is asked what can be done to clean up this national disgrace.[70] In the course of one article the author speaks of how one out of five marriages winds up in the divorce courts and then says: "That is no longer news; it has been widely viewed with alarm in pulpits, courtrooms, colleges and the press."[71] In another article he maintains that if the implications of the survey on divorce which he is reporting are correct, our divorce rate could be cut fifty per cent if efforts were made to cure sick marriages rather than rush them immediately into the "execution chamber of divorce."[72]

Another author writing about the American family and divorce says: "The American divorce record is, from the social point of view, startling, and, when one translates it into the disappointment and suffering of individual men and women, pathetic . . . An increase in happy wholesome marriages is the only permanent solution of our divorce problem."[73]

But perhaps the most important and most widely publicized civil recommendation that something be done about the national scandal of our divorce laws and that a better preparation for marriage be required is contained in the report requested from the American Bar Association by the

[69] David G. Wittels, "The Post Reports on Divorce," *Saturday Evening Post,* January 21, 1950, p. 20.
[70] *Ibid.,* February 18, 1950, p. 28.
[71] *Ibid.,* January 28, 1950, p. 22.
[72] *Ibid.,* February 4, 1950, p. 42.
[73] Ernest R. Groves and Gladys H. Groves, *The Contemporary American Family,* (Chicago: J. B. Lippincott Co., 1947), p. 480.

National Conference on Family Life, held at Washington, D.C., May 5-8, 1948, and made to that body by the legal Commission which the American Bar Association appointed. In this report it was recommended that the National Conference on Family Life record "its convictions (1) that our present divorce laws are producing widespread evils, and (2) that our laws in the field of domestic relations, instead of constituting a bulwark, are themselves a continuing threat to the stability of marriage in contemporary America."[74] Realizing the seriousness of the problem the Conference recommended that the President of the United States appoint a commission of ten or more citizens, outstanding leaders drawn from the field of law, religion, medicine, education and sociology, "to reexamine the laws regulating both marriage and divorce and legal procedures in divorce cases, in terms of their objectives, methods, and facilities: their results: and in light of the social role they have to play in the preservation of the American Home."[75] It also urged the further extension and establishment of family courts to handle divorce and marriage problems.[76] The report was presented to the Conference by Judge Paul W. Alexander of Toledo, Ohio, Vice-Chairman of the Association's Committee. It made a deep impression and was much discussed.[77] The remedial recommendations concerning divorce and marriage laws and family courts was received with much favorable comment in special articles and editorials throughout the country.[78] Considering that the National Conference on Family Life is reported to have a membership of 40,000,000[79] and that the nation at large manifested an evi-

[74] Mimeographed Report of National Conference on Family Life, Washington, D.C., May 5-8, 1948, p. 3.

[75] *Ibid.*

[76] *Ibid.*

[77] "Report on Divorce Laws Acclaimed at National Conference on Family Life," 34 *American Bar Association Journal*, (June 1948), p. 448.

[78] *Ibid.*

[79] 34 *American Bar Association Journal*, (Jan. 1948), pp. 43, 52.

dent interest in what was recommended, one must conclude that many of the people of our country are aware of the evils of divorce and see the necessity of something being done to check the divorce rate.

On September 7, 1948, the House of Delegates of the American Bar Association in a meeting at Seattle, Washington, approved and adopted as their own the recommendations which their delegation had made at the National Conference on Family Life.[80] They too voted to urge the President of the United States to appoint a commission to study marriage and divorce problems and recommended that family courts be extended and established.[81] They also voted to set up within their own body a "Special Committee on Divorce and Marriage Laws and Family Courts," to carry forward their proposals. Through this special Committee the Association said that it hoped to make a "major contribution to the stability and moral health of the American family, and so to the well-being of our nation."[82]

Clearly, therefore, together with the Church and Pope Pius XII there are others who understand the tremendous evil daily befalling our country because of divorce. While these persons do not understand the inherent evil of divorce with remarriage, they are in agreement with the Holy Father to this extent that something must be done to stem divorce's tide. To the divorce problem of the United States a solution is earnestly sought. A modification of present laws with an attempt at uniformity among the states, and the setting up of family courts to explore and counsel every possibility of reconciliation before the granting of the divorce decree would be a vast improvement over the present ease and lack of concern with which divorces are granted in many areas. It would probably lessen to a certain degree the large annual number of divorces granted and hence in

[80] "Association Offers Specific Solutions for Marriage and Divorce Law Evils," 34 *American Bar Association Journal*, (Oct. 1948), p. 894.

[81] *Ibid.* pp. 894-895.

[82] *Ibid.* p. 896.

this respect is desirable. Such a program, however, does not go to the heart of the problem, since it denies the basic enduring quality of the valid matrimonial contract. The heart of the problem is that the valid matrimonial contract has the property of indissolubility and that the state has no power whatsoever to sever the real and valid marriage bond.

It is profoundly hoped that should the President of the United States do as has been suggested by the American Bar Association and the National Conference on Family Life and appoint a committee to study in a special way the divorce problem, that the committee will find the solution which God himself has given us with regard to marriage and divorce, the solution which ever and firmly has been taught by the one true Church—namely, the unity and indissolubility of the marriage bond, that "what God has joined together, let no man put asunder," that the state has no power whatsoever to break the bond of a valid marriage.

CONCLUSION

And so this dissertation is brought to a close. In general we have based our treatise on Pope Pius XII's "Address to the Union of Italian Catholic Jurists," given November 6, 1949 and his "Address to the Sacred Roman Rota," of November 13, 1949. We may now state the following conclusions:

(1) The profession of judge is indeed a noble one. This nobility rests in the judge's dealing with things human and divine, in administering justice to maintain civil peace and order, in his safeguarding, restoring and perfecting in socity the rights of the noble creature man, who is made like unto the image of God, raised to a supernatural order and destined to everlasting life with God in heaven.

(2) There is today the spectacle of a crisis in the administration of justice which expresses itself in the antagonism between the just and the unjust law. This crisis can be resolved only by a return to the true Christian concept of both the nature of man, a little less than the angels, and the nature of law, which aids man to attain his ends both mediate, proper human social living, and final, his return to God, his Creator. The Catholic judge has the obligation to put into practice the Christian concept.

(3) The judge is the personification of justice, giving to each what is his due in the cases coming before his tribunal.

(4) The judge must possess the necessary qualities of knowledge, integrity and jurisdiction and follow correct judicial procedure.

(5) False concepts of law have resulted in current unjust laws. The judge who by his sentence applies an unjust law to a particular case shares with the authors of the law responsibility for its effects. He may never command anyone to commit an act intrinsically evil. He may in no case expressly recognize and approve an unjust law. Since, how-

ever, not every application of an unjust law is equivalent to its recognition and approval, the judge may, and sometimes must, permit an unjust law to take its course in order to avoid a much greater evil. He may at times inflict a penalty for the violation of an unjust law, if the penalty is of such a nature that the person affected by it is reasonably disposed to accept it for a much higher good and for higher motives.

(6) Some theologians have held that the judge's granting of a civil divorce for marriages valid before God and the Church is an act intrinsically evil and hence cannot be permitted. Other theologians have held the more common view that the granting of such a divorce is not intrinsically evil but is proximate material cooperation in the evil of a possible invalid remarriage, and hence can be permitted for a sufficiently weighty reason. The Holy Father in his address to the jurists followed the more common view when he said a Catholic judge could not pronounce a sentence of civil divorce for a marriage valid before God and the Church except for reasons of great weight. If reasons of great weight are present the judge may grant the divorce. The Holy Father in his address settled the above controversy. Therefore we may now say it is certain that the judge's granting of a civil divorce for a marriage valid before God and the Church is not intrinsically evil and that it can be granted for reasons of great weight.

(7) Theologians in the United States consider that Catholic judges here have sufficiently weighty reasons for granting such divorces when they are required to do so in the fulfillment of their office. If they should refuse to do so, the position of Catholic judges would become untenable in our land, with resultant grave harm to the entire judiciary.

When His Holiness, Pope Pius XII, clearly and fearlessly stated the Catholic judge's obligation regarding unjust laws an divorce cases, there were those who accused him of advocating principles opposed to the welfare of our country. Special effort has been made in the course of the dissertation

to point out that such is not the case. What the Holy Father had to say about unjust laws and divorce cases is the common teaching of the Church's moral theologians especially brought to the attention of our times and applied. Nor is this teaching opposed to the welfare of our land. Rather, objectively true, it is calculated to foster the common good, and is in conformity with what the better element of juristic and social thought in our country is today advocating.

What the Holy Father said of unjust laws and the individual responsibility of the Catholic judge when he applies them is in complete agreement with the very principle of individual responsibility of government officials for their official acts written into the Charter of the International Military Tribunal, and stated and used by our own government in the conduct of the Nurnberg War Criminal Trials of 1945. The Holy Father's declaration that Catholic judges cannot grant divorces from marriages valid before God and the Church except for reasons of great weight also is to this extent in agreement with the recommendations of the National Conference on Family Life, The American Bar Association, and other social thinkers, that something be done to lessen the vast number of divorces annually granted in the United States.

No more fitting parting word to the Catholic judge can be made than the words of Pope Pius XII to the jurists of Italy: "To you, dear sons, We wish with full heart that Divine Providence may grant you the exercise of your office always within the sphere of just legislation and in conformity with legitimate social requirements. Labor in every way to make for yourselves the perfect ideal of a jurist who through his competence, his wisdom, his conscientiousness, his rectitude, merits and gains the esteem and confidence of all."